EDITOR'S NOTE

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PROCEEDINGS AND ORDERS DATE: 071

CASE NBR 85-1-01439 CFX
SHORT TITLE Franklin & Marshall Coll. DOCKETED: Feb 27 19
VERSUS EEOC

Date	Proceedings and Orders
Feb 27 1986	Petition for writ of certiorari filed.
Mar 28 1986	Order extending time to file response to petition unti May 2, 1986.
May 2 1986	Brief amicus curiae of American Assn. of University Professors filed.
May 1 1986	Brief amicus curiae of 67 Colleges and Universities filed.
May 2 1986	Brief of respondent EEOC in opposition filed.
May 6 1986	Reply brief of petitioner Franklin and Marshall College filed.
May 6 1986	DISTRIBUTED. May 22, 1986
May 23 1986	REDISTRIBUTED. May 29, 1986
Jun 2 1986	Petition DENIED. Dissenting opinion by Justice White with whom Justice Blackmun joins. (Detached opinion.)

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85-1439

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

FRANKLIN AND MARSHALL COLLEGE,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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February 27, 1986

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QUESTION PRESENTED

Whether the court of appeals erred when it held, in direct conflict with the rulings of two other courts of appeals, that all confidential peer review records relating to every faculty tenure decision made by a private college during a four-year period enjoy no First Amendment protection from a subpoena issued by the Equal Employment Opportunity Commission in an employment discrimination investigation conducted under Title VII of the Civil Rights Act of 1964.

LIST OF PARTIES

The caption of the case contains the names of all parties.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Franklin and Marshall College, through its counsel, petitions for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-25a) is reported at 775 F.2d 110. The order of the district court (App., *infra*, 29a) is not reported. The determination by the EEOC not to revoke or modify its subpoena (App., *infra*, 30a-37a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 21, 1985. A petition for rehearing was denied (App., *infra*, 26a-28a) on November 29, 1985. The jur-

isdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment of the United States Constitution provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble . . . .

42 U.S.C. § 2000e-8(a) provides in pertinent part:

> In connection with any investigation of a charge filed under Section 2000e-5 of this title, the [Equal Employment Opportunity] Commission . . . shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation.

STATEMENT

1. Petitioner Franklin and Marshall College is a private, four-year liberal arts institution located in Lancaster, Pennsylvania. It was founded in 1787 and currently has a co-educational student body of approximately 1,900.

Petitioner has only 134 faculty members. The average department in the College has only five faculty members. In this setting any decision by petitioner whether or not to grant a member of the faculty tenure, which has long-term implications for both the institution and the individual, is of obvious importance to the College. Accordingly, the standards for tenure at Franklin and Marshall are strict. Approximately one-third of those considered for tenure do not obtain it, even though their achievements are otherwise very respectable. C.A. App. 83a.

On July 1, 1977, Gerard Montbertrand was hired as an untenured, assistant professor in petitioner's French Department. App., *infra*, 2a. In 1981, Montbertrand was considered for tenure on the recommendation of the French Department. The Professional Standards Committee, which includes the Dean of the College and five faculty-elected members and which performs a tenure review of all regular faculty members at the College, recommended against awarding tenure to Montbertrand. That recommendation was adopted by both the Dean and the President of the College. *Id.* at 2a-3a.

After the initial adverse decision, Montbertrand requested petitioner's President to inform him of the College's reason for denying him tenure. In response, the President wrote a letter to Montbertrand informing him that according to the minutes of the Professional Standards Committee meeting regarding Montbertrand " '[t]enure was not recommended because deficiencies in the areas of scholarship and general contributions were not sufficiently offset by performance in other areas.' " App., *infra*, 3a.

Montbertrand then requested and received reconsideration of the tenure decision by the Professional Standards Committee. Upon reconsideration, the Committee reaffirmed its earlier recommendation which was again accepted by petitioner's Dean and President. App., *infra*, 3a.

In June 1981, Montbertrand filed a charge with the EEOC, alleging that petitioner had violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), by refusing discriminatorily to grant him tenure because of his national origin, which was French. App., *infra*, 3a.[1] As part of its investigation, the EEOC issued a

[1] Prior to filing a charge with the EEOC, Montbertrand petitioned the College's Grievance Committee, claiming that the adverse tenure decision had violated his rights to academic freedom and academic

subpoena *duces tecum* requiring the following from petitioner (*id.* at 3a-4a; emphasis added):

1. For the individual *granted* or *denied* tenure during the period November 7, 1977 to the present, provide the following records or documents:
   a) Tenure Recommendation forms,
   b) COTE form results [analyzing student evaluation],
   c) Grade surveys,
   d) Enrollment data,
   e) Annual evaluation forms, including third year review,
   f) Governance evaluation forms,
   g) Publication information and evaluations by outside experts,
   h) Letters of reference,
   i) Information regarding academic advising,
   j) All notes, letters, memoranda or other documents considered during each tenure case, including curricula vitae,
   k) Recommendations of Professional Standards Committee in each tenure case, and
   l) Actions taken by the President in each tenure case.
2. Produce and make available for inspection all notes, letters, memoranda or other documents generated by each Professional Standards Committee member, as part of his/her involvement in Charging Party's original tenure case and subsequent reconsideration.
3. Produce and make available for inspection the the minutes of *each Professional Standards Committee meeting* in which *each* tenure case, during the period November 1977 to the present, was discussed.[2]

due process. The Grievance Committee dismissed the claim finding no merit to Montbertrand's allegations. App., *infra*, 3a.

In response to this request, petitioner offered to turn over all the recommendations of the Professional Standards Committee and the actions taken by the President in all tenure cases since 1977. Petitioner previously had permitted the EEOC to inspect, but not copy the minutes of the Professional Standards Committee meeting concerning the Montbertrand tenure decision. App., *infra*, 4a-5a. In addition, it offered all documents that did not involve peer review materials for all of the College's tenure candidates since 1977. With respect to the confidential peer review documents used by the Committee in assessing all such candidates, petitioner argued that disclosure to the EEOC would intrude upon petitioner's right to academic freedom. *Id.* at 5a, 36a.

When the EEOC insisted upon full compliance with its subpoena, petitioner filed an administrative application to revoke or modify the subpoena. The District Director of the EEOC denied the request. App., *infra*, 30a-37a. The District Director pointed out that the Commission's investigatory authority is extremely broad and that all of the materials requested were "relevant" within the broad meaning of that term in 42 U.S.C. § 2000e-8(a). App., *infra*, 32a-33a. With respect to petitioner's claim that its peer review documents should be privileged, the agency asserted that "[i]t is a generally accepted principle of law that where confidential information relates to a college's justification for a challenged decision, the Plaintiff's right to a fair opportunity to present his claim must prevail over any general principles of academic confidentiality." (*id.* at 36a).

[2] The only limitation on the request was that petitioner could delete the names and identifying characteristics of those reviewing the tenure candidate's qualifications. App., *infra*, 4a. But in a school as small as Franklin and Marshall, such deletions are patently inadequate to protect confidentiality.

2. After petitioner declined to comply voluntarily with the EEOC's subpoena, the Commission filed the instant lawsuit in the United States District Court for the Eastern District of Pennsylvania pursuant to Section 710 of Title VII, 42 U.S.C. § 2000e-9, seeking a judicial order enforcing the subpoena. In seeking an Order to Show Cause, the EEOC simply alleged that all of the information requested was relevant to its investigation (C.A. App. 15a); the Commission made no effort to show any particular need for any specific items subpoenaed.

Petitioner opposed the EEOC's application and filed the affidavit of Bradley R. Dewey, the Dean of the College, which, *inter alia*, described the tenure process at the College, discussed the reasons for Montbertrand's denial of tenure and compared Montbertrand's record of academic achievement and participation in the governance of the College with those of the candidates who received tenure. Dean Dewey characterized Montbertrand's scholarship record as "weak" compared with other candidates (C.A. App. 85a) and his governance record "to be unsatisfactory on the basis of quantity and quality of participation." C.A. App. 86a. The affidavit contained specific charts to demonstrate these propositions.[3] Finally, Dean Dewey explained the importance to petitioner specifically and to the academic community more generally of confidentiality in the peer review process. C. A. App. 81a-97a.

The district court, in a one-sentence order and without any legal analysis, ordered petitioner to comply with the EEOC's subpoena *duces tecum*. App., *infra*, 29a. The

[3] Dean Dewey also supplied the district court with comparative data regarding petitioner's tenure decisions of candidates who were of foreign origin compared with American nationals. Since 1975, "86% of foreign origin faculty received tenure . . . compared with a 68% tenure rate for American nationals during the same time period." C.A. App. 94a.

court did authorize petitioner to "omit the names and identifying data of other professors" in the materials to be produced to the Commission. *Ibid.* See note 2, *supra*.

A divided panel of the court of appeals affirmed. App., *infra*, 1a-25a. In holding that all of the documents requested by the EEOC had to be disclosed, the majority expressly stated that it "decline[d] to follow the Seventh and Second Circuits in recognizing either a qualified academic privilege or in adopting a balancing approach" for confidential peer review materials. *Id.* at 8a. Although the majority recognized that confidentiality in peer review is "important" to the tenure process, which is in turn a critical element of academic freedom protected by the First Amendment (*ibid.*), the court of appeals nevertheless applied what it called the broad "relevance" standard for government investigations to petitioner's documents and afforded them no additional protection. *Id.* at 11a. Finding that petitioner's peer review materials for all tenure candidates since 1977 are "part of an appropriate comparative base" and therefore were "relevant" to the EEOC's investigation, the court ordered all of the requested documents to be produced. *Id.* at 14a.

Chief Judge Aldisert dissented. App., *infra*, 15a-25a. He pointed out initially that petitioner "has provided or agreed to provide a considerable amount of data" to the EEOC. *Id.* at 17a. He then analyzed the special qualities of academic institutions and the First Amendment's protection for academic freedom generally and the tenure process in particular. After analyzing Congress' intent in Title VII, he concluded that Congress did not intend "a massive, uncontrolled intrusion into the rights of privacy and confidentiality implicated in the tenure review process of innocent third parties." *Id.* at 20a. Instead, he reasoned that Congress' intent would be served by balancing the EEOC's right to reasonable discovery and petitioner's legitimate interest in the confidentiality of its

tenure process. Under this standard, he would have required the EEOC to make at least some showing that Montbertrand's discrimination claim had substance before allowing the EEOC to obtain records and documents covering *all other* faculty members who had been granted or denied tenure since 1977. *Id.* at 24a.

The court of appeals denied rehearing *en banc*. App., *infra*, 26a.[4] Judge Adams filed a separate statement (*id.* at 27a-28a). He described the panel holding as allowing "a broad sweep of files revealing the internal debate over tenure votes, without any demonstration of special need." *Id.* at 27a. Relying upon the fact that "two other circuit courts of appeals have fashioned contrasting approaches to that adopted by the" Third Circuit and upon "the importance of the issue," Judge Adams argued that the court should have reheard the issue *en banc*. *Id.* at 28a.

REASONS FOR GRANTING THE PETITION

The Third Circuit has decided an issue of recurring and fundamental importance to every academic institution in a way that directly conflicts with decisions of two other courts of appeals. At present, there are three different legal standards employed in the courts of appeals for deciding when district courts may order production of confidential peer review materials relating to tenure decisions. In the Seventh Circuit, a party alleging possible employment discrimination must make a substantial showing of particularized need for confidential tenure materials; in the Second Circuit, such a party would have to show that the need for disclosure of confidential tenure materials outweighed the interest of the academic institution in the confidentiality of its tenure process; and in the Third Circuit, under the rule of this case, such a party need only show that confidential tenure

[4] Judges Hunter and Garth merely noted their votes to grant rehearing. App., *infra*, 26a.

materials are loosely relevant to the claim of discrimination; confidentiality does not enter into the judicial balance. Review of the decision below by this Court is therefore critical in order to establish a uniform federal rule and to bring certainty to an area of fundamental importance to the nation's colleges and universities.

Second, the court of appeals erred by holding that confidential peer review materials, which are clearly protected by the First Amendment, are nevertheless discoverable by the federal government based on no more than an assertion that materials subpoenaed pursuant to an investigation are loosely "relevant" to a possible Title VII claim. The decision conflicts with prior decisions of this Court requiring the government in other areas to make a more substantial showing of need before it is allowed to investigate activities protected by the First Amendment. The court of appeals' reasoning is also inconsistent with this Court's traditional standards of statutory interpretation when a statute as applied will intrude upon First Amendment rights. Review of the decision below by this Court is necessary to correct these manifest errors.

1. It is beyond dispute that there is a conflict in the circuits on an important issue of federal law and that, if this case had arisen in either the Seventh Circuit or the Second Circuit, the outcome would have been significantly different. In *EEOC* v. *University of Notre Dame Du Lac*, 715 F.2d 331 (7th Cir. 1983), the court of appeals analyzed carefully the conflicting interests of academic institutions in maintaining the confidentiality of the peer review process on the one hand and of the EEOC in obtaining evidence of possible unlawful discrimination on the other. The court of appeals resolved the balance by recognizing "a qualified academic freedom privilege protecting academic institutions . . . in the context of challenges to college or university tenure decisions." 715 F.2d at 337. In implementing this privilege, the court required the EEOC "to make a substantial showing of 'particularized need' for relevant information. . . ." *Id.*

at 338. Compare *Illinois* v. *Abbott & Associates, Inc.*, 460 U.S. 557, 567 (1983); *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 222 (1979); *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 400 (1959).

In this case the EEOC has never attempted to make a showing of need for any of the information requested. At a minimum such a showing would require the EEOC to evaluate the information already made available to it by petitioner and then to demonstrate why a broad intrusion into the peer review materials relating to all tenure decisions during a four-year period is still warranted as anything other than a bald assertion of the Commission's investigatory authority. Petitioner already has allowed the EEOC to inspect the minutes of the Professional Standards Committee's tenure recommendation meeting regarding Montbertrand's academic record and has given the EEOC all non-peer review materials concerning the other candidates who were considered for tenure in 1981. The EEOC has never claimed that any of this information reveals the slightest proof of discrimination. In addition, petitioner offered to provide the EEOC with similar non-peer review materials for all other candidates considered for tenure since 1977 and with aggregate data concerning tenure decisions for all foreign nationals on petitioner's faculty. Under these circumstances, the Commission has failed to satisfy the Seventh Circuit's standards for overcoming petitioner's qualified privilege in its confidential peer review materials relating to tenure decisions. Therefore, in sharp contrast to the decision below, the EEOC's subpoena would not have been enforced if the case had arisen in that circuit.

In *Gray* v. *Board of Higher Education*, 692 F.2d 901 (2d Cir. 1982), the Second Circuit considered the issue of peer review confidentiality in the context of a discovery request in a suit under 42 U.S.C. § 1981, alleging that a black educator was denied tenure because of his race. Pursuant to Fed. R. Civ. P. 26, the plaintiff sought to

learn how two members of the Personnel and Budget Committee of the college had voted when the Committee denied him tenure without providing any statement of reasons.

The court held that the resolution of the discovery issue depended on balancing the individual plaintiff's need to obtain the requested information against the academic institution's legitimate interest in protecting the confidentiality of its peer review process for making sensitive tenure decisions. 692 F.2d at 903. Although the court in that case upheld the plaintiff's request, its legal reasoning clearly would have required the Third Circuit to quash the subpoena in this case.

The Second Circuit in *Gray* adopted a different approach than that used by the Seventh Circuit in the *Notre Dame* case. The court in *Gray* used a balancing test for determining when confidential tenure information must be disclosed. 692 F.2d at 905. Under its rule a court should weigh the party's need for particular information against the college's interest in the confidentiality of its tenure materials. In applying the balancing test to the facts in *Gray*, the court of appeals found that the limited information requested should be produced because plaintiff had to prove discriminatory intent and the college had failed to supply him with any statement of reasons for his denial of tenure. 692 F.2d at 905-906. The court emphasized that the intrusion into the peer review process was minimal. In that case, plaintiff sought only information about how two members of the Committee had voted with respect to plaintiff, and the Second Circuit clearly indicated that even this limited information would not have been discoverable if the college had given him a statement of reasons for his denial of tenure. 692 F.2d at 906-908.

In this case, by contrast, the EEOC has requested and the Third Circuit has ordered disclosed not only Montbertrand's peer review materials but also all peer review documents for all tenure candidates for the entire col-

lege for the period 1977-81. Moreover, Montbertrand did receive a statement of reasons for his denial of tenure; and the EEOC already has received substantial quantities of information relevant to both the issue of discriminatory intent and disparate impact.[5] Under the Second Circuit's balancing of the relevant interests implicated by the EEOC's subpoena, the EEOC's request should have been denied. Compare *Keyes* v. *Lenoir Rhyne College*, 552 F.2d 579, 581 (4th Cir. 1977) (balancing college's interest in confidentiality against plaintiff's need for peer review materials of all faculty members; held disclosure not required). In any event, the Third Circuit explicitly refused to adopt a balancing approach. App., *infra*, 8a. The decision of the Third Circuit, therefore, conflicts directly with that of the Second Circuit.[6]

The Third Circuit itself recognized that its decision placed it in conflict with two other circuits. App., *infra*, 8a; page 7, *supra*. Moreover, it is a conflict which is relevant to every Title VII claim of discrimination in a tenure decision. Such a substantial federal question clearly warrants resolution by this Court.

2. The Third Circuit's holding that Title VII requires petitioner to disclose all confidential materials relating to all tenure decisions made during a four-year period

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[5] Under Title VII, the EEOC in this case would not have to prove intent. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 429-433 (1971); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973).

[6] Although the court of appeals in this case paid lip service to petitioner's interest in the confidentiality of its peer review process for deciding tenure, it accorded that interest absolutely no weight in deciding whether to order the information revealed to the EEOC. In essence, the court's decision is in accord with the decision of the Eleventh Circuit in *In re Dinnan*, 661 F.2d 426 (1981), cert. denied, 457 U.S. 1106 (1982). When certiorari was denied in *Dinnan*, there was no inter-circuit conflict because neither *Gray* nor *Notre Dame* had been decided. After this Court denied certiorari in *Dinnan*, the Second Circuit clearly expressed its disagreement with the Eleventh Circuit's approach: "we think the opinion [in *Dinnan*] accords too little weight to the concerns for confidentiality in the academic tenure decision-making process." 692 F.2d at 904-905 n.6.

under a loose relevance standard is in conflict with decisions of this Court because it gives no weight to the First Amendment stature of academic freedom in general and the tenure review process in particular.

(a) This Court has previously held that this nation "is deeply committed to safeguarding academic freedom which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment. . . ." *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1967). See *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 312 (1978) (Powell, J.). Justice Frankfurter defined the key elements of constitutionally protected academic freedom when he listed the "'four essential freedoms' of a university" in his concurring opinion in *Sweezy* v. *New Hampshire*, 354 U.S. 234, 263 (1957) (emphasis added), and the first freedom he cited was the right to determine "*who may teach.*" See *Regents of the University of Michigan* v. *Ewing*, —— U.S. ——, 106 S. Ct. 507, 514 & n.12 (1985); *Wieman* v. *Updegraff*, 344 U.S. 183, 197 (1952). Thus, any governmental investigation that will significantly affect an academic institution's exercise of this basic freedom will require careful judicial scrutiny.

The tenure decision is the most important part of every college and university's decision about who shall teach. The Dean at Franklin and Marshall described the importance of the tenure decision this way:

> Barring dramatic events, the award of tenure is the award of a lifetime contract. If an error is made, several generations of students must bear the brunt of that error. Tenure decisions carry great long-range consequences for the quality of education a college can offer.

C. A. App. 96a. See L. Joughin, Academic Freedom and Tenure 5-6 (1967); American Ass'n. of University Pro-

fessors, Statement of Principles on Academic Freedom and Tenure (1940); cf. *Board of Regents* v. *Roth*, 408 U.S. 564 (1972). Because of the importance of the tenure decision to the ongoing quality of an academic institution, peer review of the suitability of each candidate for tenure is critical.

> [T]he peer review process is essential to the very lifeblood and heartbeat of academic excellence. . . . [It is] the best and most reliable method of promoting academic excellence and freedom by assuring that faculty tenure decisions will be made objectively on the basis of frank and unrestrained critiques and discussions of a candidate's academic qualifications.

EEOC v. *University of Notre Dame du Lac*, 715 F.2d at 336. See *Kunda* v. *Muhlenberg College*, 621 F.2d 532, 547 (3d Cir. 1980).

The peer review process functions because the participants offer candid assessments of each candidate in reliance upon a long-standing tradition of confidentiality. The American Council of Education, in its Guidelines for Colleges and Universities, No. 7 (Dec. 1981), explains that "[m]ost educators believe that confidentiality is crucial to [the peer review] process." See Report of the Comm. on Confidentiality in Matters of Faculty Reappointment, U. Chi. Rec. 165 (May 22, 1979). Confidentiality is as important to academic peer review as it is to other activities where this Court has upheld claims of confidentiality, such as petit jury deliberations, *Clark* v. *United States*, 289 U.S. 1, 13 (1933); governmental deliberations, *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975), *United States* v. *Nixon*, 418 U.S. 683, 705 (1974) and grand jury investigations, *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. at 400. Cf. *Brown* v. *Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982) (disclosure of contributors to minor political party unconstitutional).

(b) The court of appeals' first fundamental error was its failure to recognize the constraint that the First Amendment imposes upon the proper scope of any governmental investigation. It is clearly not sufficient to protect petitioner's academic freedom to permit the EEOC to pursue its extremely broad investigation under the loose relevance standard employed by the court below. This Court has held in other contexts that before the government pursues an investigation into First Amendment protected activities it must demonstrate more than the loose relevance of the information to a legitimate governmental purpose. Ordinarily, the government must show that the protected materials are substantially related to the government's purpose and that needed information cannot be obtained in any other manner. See, *e.g.*, *Sweezy* v. *New Hampshire*, 354 U.S. at 254; *Gibson* v. *Florida Legislative Investigation Committee*, 372 U.S. 539, 546, 557 (1963). *Cf. Branzburg* v. *Hayes*, 408 U.S. 665, 710 (1972) (Powell, J., concurring) (need to balance First Amendment and governmental interests in context of particular case). But, as we have already shown, the EEOC made no showing that all confidential tenure materials for a four-year period were substantially related to its investigation of Montbertrand's charge in light of the extensive information already available to the Commission. Nor, of course, did the court of appeals even attempt to balance petitioner's First Amendment interests in confidentiality against the needs of the EEOC.

The court of appeals committed a second error by failing to interpret Title VII so as to avoid creating a constitutional issue. Under well-settled principles of statutory construction, the court of appeals should have assumed that Congress would not intend that its statute intrude into a protected First Amendment area, unless Congress clearly expressed that intent. See, *e.g.*, *Lowe* v. *SEC*, —— U.S. ——, 105 S. Ct. 2557, 2563 & n.24 (1985); *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 507 (1979); *Machinists* v. *Street*, 367 U.S. 740, 749 (1961).

See also *Murray* v. *The Charming Betsy*, 2 Cranch 64, 118 (1804); *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932).

The court of appeals, however, ignored this Court's fundamental rule of construction that federal statutes should be interpreted in a manner that will avoid First Amendment issues. The court examined Title VII for evidence that Congress did *not* intend to permit the EEOC to intrude into this area of constitutionally-protected academic freedom. Finding nothing in the language or legislative history of Title VII that so restricted the EEOC's authority, the court concluded that petitioner should be treated "the same as any other employer." App., *infra*, 21a (Aldisert, C.J., dissenting). See *EEOC* v. *Shell Oil Co.*, —— U.S. ——, 104 S. Ct. 1621 (1984). The court of appeals should have examined the language and legislative history of Title VII for proof that Congress expressly did intend to give the EEOC virtually unlimited authority to intrude into the sensitive area of confidential academic peer review. But it is clear that Congress did not express any such specific intent and the court of appeals was therefore clearly wrong in refusing to give *any* protection to petitioner's tenure deliberations against an administrative subpoena issued in a Title VII investigation. Because the decision plainly conflicts with this Court's clear teachings regarding the proper scope of governmental investigations into First Amendment protected areas and the correct method of interpreting a federal statute in light of a serious constitutional issue, review by this Court is warranted.

* * * * *

The ruling of the court of appeals will clearly inhibit frank and unrestrained discussion within the academic community on tenure decisions and will thus impair the quality of those discussions. Any discrimination complaint by a disgruntled candidate will automatically require disclosure of all confidential tenure deliberations and recommendations for the entire college regardless of the comparative need of the EEOC for the information

and the college for confidentiality.[7] Such a result will, in turn, have widespread adverse effects on the fundamental purposes of the academic world to conduct unfettered research and to freely disseminate knowledge. App., *infra*, 28a (Adams, J.). Only this Court can resolve the conflicting approaches of the courts of appeals on this issue and only this Court can ensure that every academic institution's legitimate First Amendment activities are protected from overly broad federal investigations by more than the loose relevance standard applied by the Third Circuit in this case. The stakes are too large and the interests too important for the applicability of the First Amendment's academic freedom protections to turn on the fortuity of which part of the nation the academic institutions are located.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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February 27, 1986

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[7] The Third Circuit's decision has already been followed by at least one district court in another circuit. See *Rollins* v. *Farris*, 39 F.E.P. Cases 1102, 1104-1105 (E.D. Ark. 1985).

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-1739

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Appellee

vs.

FRANKLIN AND MARSHALL COLLEGE,
Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Misc. No. 84-0675)

Argued August 5, 1985

Before: ALDISERT, *Chief Judge*,
STAPLETON and MANSMANN,
Circuit Judges

(Filed OCTOBER 21, 1985)

OPINION OF THE COURT

MANSMANN, *Circuit Judge*.

This court must decide whether the district court erred in requiring Franklin and Marshall College ("College") to comply with a subpoena duces tecum issued by the Equal Employment Opportunity Commission ("EEOC") which compels disclosure of confidential peer review material. The College and the *amici curiae* urge adoption of a qualified academic peer review privilege which, if properly applied to the facts at issue, would protect, they argue, the confidential material from the agency's subpoena. After careful consideration of all matters raised by brief and in oral arguments, we decline to adopt the proferred qualified academic peer review privilege. Because we find that the material sought by the EEOC is relevant to its investigation, the order compelling compliance with the subpoena will be affirmed.

I.

This subpoena enforcement action arises out of the EEOC's investigation of a charge of discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-2000e-17, filed by Gerard Montbertrand, a former assistant professor who was denied tenure, against the College. Professor Montbertrand was hired on July 1, 1977 as a member of the College's French Department. He was assigned primarily upper level French courses, although the College asserts that, due to the Department's limited size (4 professors), he was expected to be able to teach lower level French language courses. In the Fall of 1980, Professor Montbertrand was reviewed for tenure by the Professional Standards Committee. The committee is composed of the Dean of the College and five faculty-elected members. It performs all tenure reviews at the College. The Chairperson of the French and Italian Departments did inform the committee of evaluations recommending Professor Montbertrand for tenure. The Professional Standards Committee, however, recommended against awarding tenure to Montbertrand. That recommendation was accepted by the Dean and by the President of the College.

After Professor Montbertrand was informed of the denial of his tenure, he requested a written statement of the reasons. In a letter from the President of the College dated January 31, 1981, Montbertrand was informed that the minutes of the Professional Standards Committee stated that "[t]enure was not recommended because deficiencies in the areas of scholarship and general contributions were not sufficiently offset by performance in other areas." Appendix. at 101a.

Professor Montbertrand requested reconsideration of the tenure decision. The Professional Standards Committee reconsidered its decision in light of additional information submitted by Montbertrand and by others. The committee reaffirmed its earlier recommendation to deny tenure. That recommendation was again accepted by the Dean and by the President of the College.

Professor Montbertrand petitioned the College's Grievance Committee for review of the tenure decision, alleging denial of academic freedom and academic due process. After reviewing the allegations and finding no merit in the claims, the Grievance Committee dismissed the petition in May of 1981.

In June of 1981, Professor Montbertrand filed a charge of discrimination with the EEOC alleging discrimination based on his French national origin. In the course of its investigation, the EEOC issued the subpoena duces tecum which is the subject of this action. The subpoena required that the College:

1. For the individual *granted* or *denied* tenure during the period November 7, 1977 to the present, provide the following records or documents:
    a) Tenure Recommendation forms,
    b) COTE form results [analyzing student evaluation],

c) Grade surveys,

d) Enrollment data,

e) Annual evaluation forms, including third year review,

f) Governance evaluation forms,

g) Publication information and evaluations by outside experts,

h) Letters of reference,

i) Information regarding academic advising,

j) All notes, letters, memoranda or other documents considered during each tenure case, including curricula vitae,

k) Recommendations of Professional Standards Committee in each tenure case, and

l) Actions taken by the President in each tenure case.

2. Produce and make available for inspection all notes, letters, memoranda or other documents generated by each Professional Standards Committee member, as part of his/her involvement in Charging Party's original tenure case and subsequent reconsideration.

3. Produce and make available for inspection the minutes of each Professional Standards Committee meeting in which each tenure case, during the period November 1977 to the present, was discussed.

Appendix, at 32a-33a. The EEOC offered to accept the material with names and identifying characteristics deleted. *Id.* at 129a.

Prior to the issuance of the subpoena, the College had permitted the EEOC to review, but not copy, the minutes of all Professional Standards Committee meetings

regarding the Montbertrand decision. In response to the subpoena, the College agreed to provide the EEOC with data regarding the performance of each tenure candidate considered from 1977 to the date of the subpoena as well as the disposition of each case and the statement of reasons from the Professional Standards Committee (subpoena requests I(k) & I(l)). The College also offered to comply with the portions of the subpoena seeking documents not considered confidential peer review material such as COTE scores, grade surveys and enrollment data (subpoena requests 1(b), 1(c) & 1(d)).

At issue before us now is the College's refusal to provide the bulk of the material sought, including tenure recommendation forms prepared by faculty members, annual evaluations (except those prepared by the Dean), letters of reference, evaluations of publications by outside experts, and all notes, letters, memoranda or other documents considered during each tenure decision (subpoena requests 1(a), 1(e), 1(g), 1(h), 1(j), 2 & 3).[1]

When the EEOC pressed for full compliance with the subpoena, the College pursued administrative relief by filing with the agency a Petition to Revoke or Modify the Subpoena. After the EEOC denied the petition on August 18, 1983, the College appealed to the EEOC to alter its decision. The EEOC denied that appeal on June 29, 1984. The College informed the EEOC on July 26, 1984 that it would not fully comply with the subpoena.

The EEOC then initiated the instant litigation by filing an Application for Order to Show Cause Why a Subpoena Should Not Be Enforced in the district court. On November 9, 1984, the court filed an Order compelling the College to comply with subpoena requests 1(e), 1(h),

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[1] The College apparently does not possess governance evaluation forms and information regarding academic advising (subpoena requests 1(f) & 1(i)). *See* Appendix at 62a.

1(j), 2 and 3 but, with the EEOC's concurrence, allowing the College to omit names and identifying data.

The College subsequently filed this appeal and moved the district court for a stay pending appeal. On December 28, 1984, the district court filed an order staying enforcement of its order compelling compliance with the subpoena pending disposition of the appeal. We granted Gettysburg College and Dickinson College leave to file an *amici curiae* brief. We also permitted Allegheny College, Bucknell University, Chatham Ccllege, Haverford College, Lafayette College and Lehigh University to participate as *amici curiae* and to adopt the *amici curiae* brief previously filed.

II.

On appeal, the appellant and the *amici curiae* urge this court to reverse the district court's order compelling the College's compliance with the subpoena duces tecum issued by the appellee. The appellant contends that "the quality of a college, and in a broader sense, academic freedom, which has a constitutional dimension, is inextricably intertwined with a confidential peer review process." Brief of Appellant, at 14. For this reason, the appellant argues, "disclosure of peer review material should be compelled only when facts and circumstances give rise to a sufficient inference that some impermissible consideration played a role in the tenure decision." *Id.* at 15. The appellant suggests that the court should adopt a qualified academic peer review privilege which would prevent disclosure of confidential peer review material absent a showing of an inference of discrimination. Adoption of such a privilege, argues the appellant, strikes the proper balance between the needs of the EEOC in its investigation and the College's interest in maintaining academic freedom.

The appellant and the *amici curiae* are not the first to advocate the privilege. Several United States Courts of Appeals have addressed the issue and have reached differ-

ing results. The United States Court of Appeals for the Seventh Circuit has recognized a qualified privilege requiring particularized need before ordering disclosure of the names and identities of persons responsible for materials generated in the peer review tenure process. *EEOC v. University of Notre Dame Du Lac*, 715 F.2d 331, 337-38 (7th Cir. 1983). The Court of Appeals noted the unusual posture of the case, stating that "[t]his case is unique in that Notre Dame is voluntarily producing redacted files to the EEOC." *Id.* at 337 n.4. The court did suggest that in a case where disclosure of the confidential material was in controversy, "there must be substance to the charging party's claim and thorough discovery conducted before even redacted files are made available." *Id.*

The United States Court of Appeals for the Second Circuit adopted a balancing approach, but not a rule of privilege, in a discrimination action brought under 42 U.S.C. §§ 1981, 1983 & 1985. *Gray v. Board of Higher Education, City of New York*, 692 F.2d 901, 904-05 (2d Cir. 1982). The Court of Appeals applied its balancing test and decided, on the particular facts of the case, to reverse the district court's order denying the plaintiffs' motion to compel discovery of the votes of two members of the tenure committee. While the case did not involve a subpoena issued by the EEOC pursuant to Title VII, the analysis of the *Gray* court may be helpful nonetheless in the context of a Title VII investigation. *Cf. EEOC v. University of Notre Dame Du Lac*, 715 F.2d at 337 & n.3.

Unlike the Seventh and Second Circuits, the United States Court of Appeals for the Fifth Circuit expressly rejected a proposed privilege based on academic freedom. *In re Dinnan*, 661 F.2d 426, 427 (5th Cir. 1981), *cert. denied*, 457 U.S. 1106 (1982). The *Dinnan* court held that a member of the College Education Promotion Review Committee could not refuse to reveal his vote on the application for promotion in question. *Id.*

We decline to follow the Seventh and Second Circuits in recognizing either a qualified academic privilege or in adopting a balancing approach. It is true that the concept of "[a]cademic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment." *Regents of the University of California v. Bakke*, 438 U.S. 265, 312 (1978) (Powell, J., announcing Court's judgment and expressing his views of case). "'[T]he four essential freedoms' of a university" have been said to include the freedom "to determine for itself on academic grounds who may teach, what may be taught, how it should be taught, and who may be admitted to study." *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in result) (citation omitted). Central to the determination of "who may teach," or who will receive tenure, has been the system of peer review by confidential evaluations and recommendations of tenured faculty. "[T]he peer review system has evolved as the most reliable method for assuring promotion of the candidates best qualified to serve the needs of the institution." *Johnson v. University of Pittsburgh*, 435 F. Supp. 1328, 1346 (W.D. Pa. 1977) (citation omitted) (quoted in *Kunda v. Muhlenberg College*, 621 F.2d 532, 548 (3d Cir. 1980)).

We recognize that confidentiality in the peer review system plays an important role in obtaining candid, honest assessments of the candidates under review and, thus, has been essential to the determination of "who may teach," especially in such close educational settings of the size of appellant where tenure applicants and tenure decision-makers continue to work side-by-side. Appellant and *amici curiae* have forcefully argued the increased importance of confidentiality based upon the relatively small size of the teaching staffs and administrative personnel. They cite embarrassment, confrontational situations and the fear of less than honest evaluations as likely results of a lack of confidentiality.

In assessing the importance of the academic freedom principles at issue, our starting point is an examination of Congress' intent in enacting and amending Title VII legislation. We begin with Congress' manifest refusal to exempt academic institutions from Title VII's prohibition against discrimination. As the Supreme Court of the United States has reminded us, "Congress indicated that it considered the policy against discrimination to be of the 'highest priority.'" *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974) (citation omitted). Congress clearly intended that this goal be no less important in the academic setting than in industry. In 1972, Congress deleted the exemption for institutions of higher education which was contained in the original legislation. As this court has stated previously, "[t]he legislative history of Title VII is unmistakable as to the legislative intent to subject academic institutions to its requirements." *Kunda*, 621 F.2d at 550. The House Report from the Education and Labor Committee, reporting on several proposed amendments including the elimination of the immunity under Title VII previously extended to academic institutions, states:

> There is nothing in the legislative background of Title VII, nor does any national policy suggest itself to support the exemption of these educational institution employees—primarily teachers—from Title VII coverage. . . . The committee feels that discrimination in educational institutions is especially critical. The committee can not imagine a more sensitive area than educational institutions where the Nation's youth are exposed to a multitude of ideas that will strongly influence their fu[t]ure development. To permit discrimination here would, more than in any other area, tend to promote misconceptions leading to future patterns of discrimination.

H.R. Rep. No. 92-238, 92nd Cong., 2nd Sess. 19-20, *reprinted in* 1972 U.S. Code Cong. & Ad. News 2137,

2155. In *Kunda v. Muhlenberg College*, this court concluded from the legislative history of Title VII and its amendments that, notwithstanding principles of academic freedom, tenure decisions fall within the intended scope of the Act. 621 F.2d 532, 547-48 (3d Cir. 1980). "Congress must have recognized that in order to achieve its legislative goals, courts would be forced to examine critically university employment decisions." *Davis v. Weidner*, 596 F.2d 726, 731 (7th Cir. 1979).

We look further for evidence that Congress intended that special treatment be accorded academic institutions *under investigation* for discrimination and find none. No inference can be drawn from the legislative history of Title VII, as amended, that Congress intended or would permit academic institutions to bar the EEOC's access to material relevant to an investigation. A privilege or Second Circuit balancing approach which permits colleges and universities to avoid a thorough investigation would allow the institutions to hide evidence of discrimination behind a wall of secrecy.

We are not unmindful of nor insensitive to the importance of confidentiality in the peer review process, especially for institutions of the size and character of the appellant college and the *amici curiae*. We recognize that permitting disclosure to the EEOC of confidential peer review material may perhaps burden the tenure review process in our nation's universities and colleges. In the face of the clear mandate from Congress which identified and recognized the threat of unchecked discrimination in education, however, we have no choice but to trust that the honesty and integrity of the tenured reviewers in evaluation decisions will overcome feelings of discomfort and embarrassment and will outlast the demise of absolute confidentiality.

III.

Appellant and *amici* urge an interpretation of the discovery rules which would require an initial showing by the EEOC of some merit to the discrimination charge before disclosure of confidential material could be ordered. In this regard, appellant argues that, despite the preliminary stage of this matter (i.e., prior to any litigation having been filed), the EEOC should be held to a higher discovery standard than parties would be once litigation has commenced. Further, appellant implicitly argues that discovery should be limited to the pretext issue and that any evidence that its legitimate reason for tenure denial is pretext (though denied) can be drawn from the non-confidential material and summary charts which the College is willing to release to the EEOC.

We reject this concept because it is inconsistent with the language, history and purpose of Title VII and with Congress' grant of investigatory authority to the EEOC. Congress has made clear that the scope of the EEOC's subpoena power is limited by the standard of relevance. *See* 42 U.S.C. § 2000e-8(a). The EEOC is not limited, as the appellant appears to suggest, to that which might be relevant at trial. Rather, the EEOC is entitled to all that is relevant to the charge under investigation. *EEOC v. Shell Oil Co.*, 52 U.S.L.W. 4399, 4402 (April 2, 1984). In *EEOC v. Shell Oil Co.*, the Supreme Court of the United States rejected the proposition that a district court must find the charge of discrimination to be well-founded, verifiable, or based on reasonable suspicion before enforcing an EEOC subpoena. *EEOC v. Shell Oil Co.*, 52 U.S.L.W. at 4404 n.26 & 4405 n.33. The Court explained:

> The district court has a responsibility to satisfy itself that the charge is valid and that the material requested is "relevant" to the charge [citation

> omitted] and more generally to assess any contentions by the employer that the demand for information is too indefinite or has been made for an illegitimate purpose. [citations omitted] However, any effort by the court to assess the likelihood that the Commission would be able to prove the claims made in the charge would be reversible error.

Id. at 4404 n.26.

The concept of relevancy is construed broadly when a charge is in the investigatory stage. *EEOC v. University of Pittsburgh*, 643 F.2d 983, 986 (3d Cir.), *cert. denied*, 454 U.S. 880 (1981). The Supreme Court of the United States, in discussing the application of the relevance standard to a Title VII subpoena, noted Congress' apparent endorsement of an interpretation of the relevance standard which affords the EEOC access "to virtually any material that might cast light on the allegations against the employer."

> Since the enactment of Title VII, courts have generously construed the term "relevant" and have afforded the Commission access to virtually any material that might cast light on the allegations against the employer. In 1972, Congress undoubtedly was aware of the manner in which the courts were construing the concept of "relevance" and implicitly endorsed it by leaving intact the statutory definition of the Commission's investigative authority. On the other hand, Congress did not eliminate the relevance requirement, and we must be careful not to construe the regulation adopted by the EEOC governing what goes into a charge in a fashion that renders that requirement a nullity.

EEOC v. Shell Oil Co., 52 U.S.L.W. at 4403.

Clearly, an alleged perpetrator of discrimination cannot be allowed to pick and choose the evidence which may

be necessary for an agency investigation. There may be evidence of discriminatory intent *and* of pretext in the confidential notes and memorandum which the appellant seeks to protect. Likewise, confidential material pertaining to other candidates for tenure in a similar time frame may demonstrate that persons with lesser qualifications were granted tenure or that some pattern of discrimination appears. *Accord Namenwirth v. Board of Regents of University of Wisconsin System*, 769 F.2d 1235, 1240-41 (7th Cir. 1985) (comparative evidence may be appropriate to rebut employer's proffered, nondiscriminatory explanation). Relative qualifications of those who teach in academic institutions are not amenable to objective comparison in charts. Instead, the peer review material itself must be investigated to determine whether the evaluations are based in discrimination and whether they are reflected in the tenure decision.[2]

We hasten to add in this regard that it is neither for the EEOC nor for the courts to reevaluate a candidate's qualifications. *Kunda*, 621 F.2d at 547-48 (cited with

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[2] Tenure decisions are not entitled to special treatment in Title VII actions merely because they are founded in part on subjective criteria, including the level of esteem in which a candidate is held by his colleagues and peers. Similar criteria must be considered in a Title VII review of any employment decision.

> The subjective esteem of colleagues and supervisors is often the key to any employment decision. Yet, especially in the blue-color context, the courts have not hesitated to review with great suspicion subjective judgments that adversely affect minorities. . . . Indeed, subjective esteem is more important in certain blue-colar contexts, where, for example, lives may depend on the employee's performance and good judgment. . . . And because all lawyers and judges are trained in academia, courts are better equipped to scrutinize academic decisionmaking than decisionmaking in the perhaps less familiar blue-colar context.

Namenwirth, 769 F.2d at 1244-45 (Swygert, J., dissenting) (citations omitted).

approval in *Hishon v. King & Spalding*, 52 U.S.L.W. 4627, 4630 n.4 (May 22, 1984) (Powell, J., concurring)). The scope of the EEOC's role is to determine whether or not there is evidence to support a charge that an employment decision was based upon reasons protected by federal statute. The oft times difficult decision to promote or to grant tenure shall be left exclusively to this nation's colleges and universities so long as the decisions are not made, in part large or small, upon statutorily impermissible reasons.

IV.

After careful review of the EEOC's subpoena requests with the appropriate relevance standard in mind, we find the EEOC's requests are relevant and not overbroad. The material pertaining to the Montbertrand tenure decision is clearly revelant to the investigation. The EEOC also asks for material on persons other than Montbertrand who were considered for tenure from November 7, 1977 to the date of the subpoena. Since Montbertrand was hired in 1977 and considered for tenure in 1980, the data requested on other candidates is part of an appropriate comparative base. We note parenthetically that the district court ordered, with EEOC's concurrence, that names and identifying data of the other professors would be omitted.

Consequently, since we find that the material sought in the subpoena duces tecum at issue is relevant to the EEOC's investigation, the district court's order will be affirmed.

ALDISERT, *Chief Judge*, dissenting.

What divides this panel is a philosophical difference in two separate, but in this case, related, broad concepts: the extent to which an EEOC administrative subpoena may cast an immense discovery net that compromises privacy expectations of innocent third parties without the EEOC being put to the most meager burden of asserting a factual justificatory predicate for its actions; and the extent, if any, to which an employment discrimination claim based on professional tenure denial in a four person Department of French in a small liberal arts college differs from a discrimination claim against a multinational corporation such as Shell Oil Company.

The majority believe that there is absolutely no difference between what may be obtained by an EEOC administrative subpoena when a claim for lifetime tenure and position is implicated in the context of a small liberal arts college or when made in the context of a typical commercial employer. Notwithstanding the wealth of materials already furnished the EEOC by the college relating to the Montbertrand's application for tenure, the majority would not place any burden whatsoever on the EEOC to show that it cannot intelligently evaluate the claim until it was in possession of case histories of every tenured position implicating confidential communications of innocent third parties. I reject both approaches because I abhore dogmatic application of the law. I reject slot machine justice, what Roscoe Pound called "Mechanical Jurisprudence," [1] because it has been my experience that in many cases everybody may be a bit right, that nobody is completely right or completely wrong, and that each case has its own pathology. Thus, automatic and unbridled EEOC subpoena searches cannot be the law; and if it is, I am reminded of Chamfort's aphorism: "It

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[1] Pound, *Mechanical Jurisprudence*, 8 Colum. L. Rev. 605 (1908).

is easier to make certain things legal than to make them legitimate."

The claimant contends that he was discriminated against because he was a French native. The EEOC has been given virtually everything contained in claimant's personnel files. It seems to me that the administrative subpoena should not be enforced in its entirety unless the EEOC demonstrates compelling necessity for rooting through confidential files of other faculty members. Certainly, the doctrine of *res inter alios acta* is alive and kicking today, and I believe that before a federal agency should be allowed to poke through the confidential files of strangers to an employment discrimination claim, it should be held to some justificatory burden before a federal judge, rather than being annointed with a ukase to fish in any waters selected by it, and it alone.

We have federal courts to draw the line against arbitrary and capricious federal agency actions and this case cries out for preliminary judicial adjudication, instead of agency action gone wild. The facts presented here require that a district court exercise a highly refined discretion and be particularly sensitive to the valid interest of confidentiality in the tenure review process before ordering wholesale production of confidential documents of strangers to this proceeding at this very preliminary stage of an investigation. Because neither the district court nor the majority accord this sensitivity, I dissent. I would reverse the judgment of the district court.

I.

Several facts underlying this appeal are critical. Appellant Franklin and Marshall is a small liberal arts college with a student enrollment of 1,900. Montbertrand sought a tenured position in a French Department that consists of four persons. As is the norm in institutions of higher education, the decisional process in awarding

tenure involves not only the college administrative staff, but faculty as well. Initial tenure decisions are made by the Professional Standards Committee, all five members of which are elected by the faculty. This committee makes tenure recommendations to the Dean and President of the College. In Montbertrand's case, the committee—comprised of faculty members only—recommended that Montbertrand be denied tenure because of his deficiencies in scholarship and in participation in college governance activities. The College administration adopted this recommendation and the administrative and judicial proceedings leading to this appeal followed.

The majority assert that the College has refused to produce "the bulk of the material sought" by the EEOC. Maj. op. typescript at 6. This characterization is not fair. The College has provided or agreed to provide a considerable amount of data.[2] I believe the district court

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[2] This material includes:

1. Materials from Montbertrand's tenure file including:
   (a) Third and Second Year Reviews;
   (b) Letters to Montbertrand on the status of his tenure review; and
   (c) Documents of Montbertrand supporting his tenure application;
2. Compilation by the College of the national origin of tenure candidates from 1977 to 1981;
3. Untitled list of faculty members, country of birth, present citizenship, and citizenship at birth;
4. Evaluations of Montbertrand's writings from four outside professors identified by name and college or university;
5. Faculty merit evaluation forms for Montbertrand;
6. Correspondence relative to Montbertrand's tenure denial;
7. January 21, 1981, letter from College President to Montbertrand discussing the fact that deficiencies in scholarship and

should have analyzed this data carefully and on the basis of such Analysis, required the EEOC to show that it had established a sufficient factual and legal basis to warrant the serious intrusion into the College's tenure review process in other cases. At a very minimum, the district court should satisfy itself of the necessity to breach the wall of confidentiality obviously present on this small campus.

II.

Colleges and universities occupy a unique position in our society. They are not commercial employers; they are not government agencies. Perhaps more than any other institution, they embody and promote under the rubric of academic freedom our cherished values of free inquiry and robust debate on a variety of subjects. As the majority correctly observe, academic freedom has constitutional underpinnings. "[T]hough not a specifically enu-

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general contributions were not offset by governance performance in other areas;

8. Handbook of College;
9. Faculty Handbook 1978;
10. Inter-office Memo from Chairman of French and Italian Departments, Angela Jeannet, to Professional Standards Committee, January 1980, regarding Third Year review of Montbertrand. The Memo provides information on work performance, publications, grants, professional activities, participation in college and department activities, and evaluation recommending Montbertrand for tenure with attached reappointment of probationary faculty.
11. COTE form results (Student Evaluations of Teaching Effectiveness);
12. Grade surveys;
13. Enrollment data;
14. Recommendations of Professional Standards Committee in each tenure case; and
15. Actions taken by the President in each tenure case.

merated constitutional right, [academic freedom] long has been viewed as a special concern of the First Amendment." *Regents of the University of California v. Bakke*, 438 U.S. 265, 312 (1978) (Powell, J., plurality opinion). The majority further note that "central to the determination of 'who may teach,' or who will receive tenure, has been the system of peer review by confidential evaluations and recommendations of tenured faculty." Maj. op. typescript at 10. Recognizing these crucial factors, the majority then analyze the legislative history of Title VII and conclude that this history somehow eradicates the importance of confidentiality in peer evaluations when the EEOC subpoenas documents generated in the tenure review process. The majority's analysis and application of legislative history to support the wholesale disclosure of all confidential materials simply proves too much.

The cited legislative history convincingly demonstrates that Congress intended Title VII to apply to universities and colleges. No one can argue to the contrary. The majority nonetheless rest their *ratio decidendi* entirely upon an analysis of the 1972 amendment to Title VII that eliminated the exemption for academic institutions. We are thus treated to a classic fallacy of irrelevance, or *ignoratio elenchi*. The error is made by attempting to prove something that has not been denied, to-wit that the 1972 amendment to Title VII took in institutions of higher learning. The question under consideration, however, is not whether Title VII was so amended but whether, on the strength of a mere conclusory allegation of discrimination, the EEOC is permitted the kind of intrusion into the tenure review process it seeks here. I find no support in the legislative history for the proposition that Congress foresaw the possibility, much less intended, that a college instructor may, with a blunderbuss allegation of discriminatory treatment against Frenchmen, devoid of factual specificity, gain unfettered access to the confidential personnel files of all his colleagues. The troublesome and

recurring problem of statutory voids was recognized many decades ago by John Chipman Gray:

> The fact is that the difficulties of so-called interpretation arise when the legislation has no meaning at all; when the question which is raised in the statute never occurred to it; when what the judges have to do is, not to determine what the Legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present.[3]

At bottom always is the task of divining the intention of the legislature. Learned Hand has observed:

> When a judge tries to find out what the government would have intended which it did not say, he puts into its mouth things which he thinks it ought to have said, and that is very close to substituting what he himself thinks right. . . . Nobody does this exactly right; great judges do it better than the rest of us. It is necessary that someone shall do it, if we are to realize the hope that we can collectively rule ourselves.[4]

Such an approach requires us to decide if Congress in fact intended a massive, uncontrolled intrusion into the rights of privacy and confidentiality implicated in the tenure review process of innocent third parties. I do not think so. I believe that the congressional intent to eliminate employment discrimination can be fully served without conferring on the EEOC such absolute and unyielding investigatory powers to embark upon a fishing expedition into confidential materials. Discovery expeditions into records of commerce and industry implicate only money and time; they do not implicate confidential evaluations

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[3] J. C. Gray, *Nature and Sources of Law* 172-73 (2d ed. 1921).

[4] L. Hand, The Spirit of Liberty 100, 109-110 (2d ed. 1954).

of professional performance uttered by intimate peers with the expectation of privacy.

III.

I do not agree with the majority's assumption that academic institutions are the same as any other employer. At least insofar as their administrative and governance structures are concerned, colleges and universities differ significantly from garden variety private employers.[5] In the context of application of the provisions of the National Labor Relations Act the Supreme Court has counseled that "principles developed for use in the industrial setting cannot be 'imposed blindly on the academic world.'" *NLRB v. Yeshiva University*, 444 U.S. 672, 681 (1979) (citation omitted). The unique characteristics of the tenure review process led the court in *EEOC v. University of Notre Dame Du Lac*, 715 F.2d 331 (7th Cir. 1983), to recognize a qualified academic review privilege. In *Notre Dame*, the court stated:

> It is clear that the peer review process is essential to the very lifeblood and heartbeat of academic excellence and plays a most vital role in the proper and efficient functioning of our nation's colleges and universities. The process of peer evaluation has evolved as the best and most reliable method of promoting academic excellence and freedom by assuring that

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[5] [A]uthority in the typical "mature" private university is divided between a central administration and one or more collegial bodies. . . . This system of "shared authority" evolved from the medieval model of collegial decision-making in which guilds of scholars were responsible only to themselves. . . . At early universities, the faculty were the school. Although faculties have been subject to external control in the United States since colonial times. . . . traditions of collegiality continue to play a significant role at many universities . . . .

NLRB v. Yeshiva University, 444 U.S. 672, 680 (1979).

faculty tenure decisions will be made objectively on the basis of frank and unrestrained critiques and discussions of a candidate's academic qualifications. *See Johnson v. University of Pittsburgh*, 435 F. Supp. 1328 (W.D. Pa. 1977). Moreover, it is evident that confidentiality is absolutely essential to the proper functioning of the faculty tenure review process. The tenure review process requires that written and oral evaluations submitted by academicians be completely candid, critical, objective and thorough in order that the University might grant tenure only to the most qualified candidates based on merit and ability to work effectively with colleagues, students, and the administration. For these reasons, academicians who are selected to evaluate their peers for tenure have, since the inception of the academic tenure concept, been assurred that their critiques and discussions will remain confidential. Without this assurance of confidentiality, academicians will be reluctant to offer candid and frank evaluations in the future.

Id. at 336.

IV.

In a subpoena enforcement proceeding the court should abjure rote application of dogma against a small college. Rather it should engage in a balancing analysis that will accord sufficient weight to the valid and competing interests at issue. The court must avoid slavish allegiance to conceptual jurisprudence, the now-discredited *Begriffsjurisprudenz*, the target of our great masters, Holmes, Pound, and Cardozo; rather, the court should always consider the decision's consequence upon the social order. The judiciary has an obligation to accommodate, whenever possible, competing interests without adopting a "zero sum" decisional structure that permits the reckless advancement of one interest irrespective of destruction wreaked upon other salutory competing interests. Yet the majority refuse to undertake this balancing analysis, opting instead to assert that somehow the legislative history of Title VII compels intrusion into the peer review system in every tenure decision made by the institution. At this time, it is not necessary for me to reach the question whether there is an academic review privilege, *see EEOC v. University of Notre Dame Du lac*, 715 F.2d 331 (7th Cir. 1983). In this case, I am completely comfortable with the approach adopted in *Gray v. Board of Higher Education*, 692 F.2d 901, 903 (2d Cir. 1982), in a discovery context:

> Any finding that information is protected from discovery must reflect a balancing between, on the one hand, the parties' right to discovery, which stems from society's interest in a full and fair adjudication of the issues involved in litigation and, on the other hand, the existence of a societal interest in protecting the confidentiality of certain disclosures made within the context of certain relationships of acknowledged social value.

Extended logically, the majority's absolutist approach elevates the ethereal factor of relevancy as the only restraint on the EEOC subpoena process. At the administrative subpoena level there is absolutely no limitation to what is or is not relevant. There is no complaint filed in the district court, no factual averments of "a short and plain statement of the claim," as required by Rule 8, Federal Rules of Civil Procedure, no stated boundaries to the allegation of discrimination. To accept the majority's formulation is to indulge in a classic Catch-22: "In discovery we have the right to examine anything that is relevant, but we can't tell what is relevant until we finish our discovery." Because of the danger of harm created by the rupture of confidentiality, we cannot lend jurisprudential dignity to Tweedledee's soliloquy. "If it was so, it might be; and if it were so, it would be; but as it isn't, it ain't. That's logic." [6]

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[6] L. Carroll, Through the Looking Glass, Chap. 4.

V.

I now turn to the various subpoena requests. I agree that Montbertrand's tenure review files should be produced with the names and other identifying criteria redacted. But records and documents pertaining to other faculty members, who were granted or denied tenure since November 7, 1977, implicate compelling confidentiality interests of strangers to these proceedings. Requests for these materials must first be evaluated by the district court in light of the considerable data already provided to the EEOC by Franklin and Marshall and by the data contained in Montbertrand's tenure file. Unless these documents disclose some modicum of substance to Montbertrand's claim of national origin discrimination, and some indication that these additional materials will prove the claim, we should not permit the serious violation of other faculty members' confidentiality that production of records will entail. Because the district court did not engage in this analysis, I would remand for appropriate findings.

To be sure, the EEOC is not required to establish a prima facie case in behalf of Montbertrand as a prerequisite to compelled production of documents. The majority properly cite *EEOC v. Shell Oil Co.*, —— U.S. —— (52 U.S.L.W. 4399, April 2, 1984), for the proposition that in a subpoena enforcement proceeding the EEOC need not establish that the charge is "well founded, verifiable, or based on reasonable suspicion." But the question here is not the *quality* of the factual predicate underlying the claim, but it is whether *any* factual predicate whatsoever is present to merit the assault on the confidential files of innocent strangers to this proceeding.

What I propose, congruent with the Second Circuit's approach in *Gray*, is a flexible, case by case approach that puts a modest burden on the EEOC whenever its request impinges upon "the confidentiality of certain disclosures made within the context of certain relationships of acknowledged social value." *Gray*, 692 F.2d at 903. At a minimum, based on materials already discussed such as in this case, the EEOC should be required to set forth a justificatory factual predicate for the confidentiality or privacy intrusions instead of naked conclusory allegations. Where, as here, confidentiality expectations of strangers are implicated, the subpoena should not, without court approval, be used as a tool in search of that predicate at the expense of privacy rights of innocent parties and of the integrity of the tenure review process.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-1739

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

vs.

FRANKLIN AND MARSHALL COLLEGE,
Appellant

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge*, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, *Circuit Judges.*

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied. Judges Hunter and Garth would grant the petition for rehearing. Judge Adams dissents and files a separate Statement Sur Denial of Petition for Rehearing.

By the Court,

/s/ Carol Los Mansmann
Circuit Judge

Dated: November 29, 1985

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-1739

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Appellee

v.

FRANKLIN AND MARSHALL COLLEGE,
Appellant

STATEMENT SUR DENIAL OF
PETITION FOR REHEARING

Present: ADAMS, *Acting Chief Judge*, SEITZ, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, *Circuit Judges.*

I would grant rehearing in banc because of the significant First Amendment implications this case holds for our colleges and universities as well as the division among the circuit courts of appeals. Federal court review of university decisions carries serious consequences for academic freedom. *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957); *Galda v. Rutgers*, No. 84-5498 (slip op.) (3d Cir., August 28, 1985) (Adams, J., dissenting). The tenure decision at issue here reduces in essence to the faculty's determination of who may teach, one of what Justice Frankfurter refererd to as "'the four essential freedoms of a university.'" *Sweezy*, 354 U.S. at 263. Yet the discovery order upheld by the panel allows for a broad sweep of files revealing the internal debate over tenure votes, without any demonstration of special need.

In recognition of the threat this may pose to unrestrained discussion within the academic community, two other circuit courts of appeals have fashioned contrasting approaches to that adopted by the panel here. Given this split in authority, and given the importance of the issue, I believe the matter merits the consideration of the entire court.

BY THE COURT,

/s/ [Illegible]
Acting Chief Judge

DATED: November 29, 1985

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Miscellaneous No. 84-0675

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Applicant

—v—

FRANKLIN AND MARSHALL COLLEGE,
Respondent

[Filed Nov. 9, 1984]

ORDER

AND NOW, this — day of November, 1984, upon consideration of the petition of the applicant, the responses of the respondent, the arguments of counsel in open court, and the briefs of counsel, it is ORDERED that the respondent shall comply with the subpoena duces tecum issued by the applicant, and shall produce the information called for by the following paragraphs and sections of said subpoena:

¶¶ 1(e), (h), (j) and ¶¶ 2 and 3.

IT IS FURTHER ORDERED that the respondent may omit the names and identifying data of other professors in the said paragraphs and sections to which respondent is ordered to comply.

BY THE COURT:

/s/ [Illegible]

APPENDIX D

EXHIBIT "F"

[SEAL]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
PHILADELPHIA DISTRICT OFFICE
127 N. Fourth Street
Philadelphia, Pennsylvania 19106

Charge No. 031812566

Subpoena No. PA-83-029

IN THE MATTER OF:

GERARD MONTBERTRAND

v.

FRANKLIN & MARSHALL COLLEGE

To: George C. Werner, Esquire
Barley, Snyder, Cooper & Barber
115 East King Street
Lancaster, Pennsylvania 17602

DETERMINATION

The Respondent, Franklin & Marshall College (herein after "Petitioner") was served on July 15, 1983, with an Equal Employment Opportunity Commission Subpoena *duces tecum*, issued by the District Director of the Philadelphia District Office, Johnny J. Butler, on July 12, 1983,

pursuant to Section 710 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-9, hereinafter "Title VII". Petitioner filed a timely Petition to Revoke or Modify the Subpoena. The Equal Employment Opportunity Commission (hereinafter the "Commission") has determined that the Petition does not support a revocation or modification of the Subpoena.

Subpoena No. PA-83-029

The Subpoena requests documents and information concerning the Charge of Discrimination filed by Gerard Montbertrand (hereinafter the "Charging Party") alleging national origin discrimination with regard to his tenure denial. In general, Subpoena No. PA-83-029 requests documents regarding information relied upon to reach a tenure decision with respect to the Charging Party, and whether the Charging Party has any status which would make him eligible to receive tenure. Furthermore, the Subpoena requests information as to the documentation relied upon by the Petitioner in making its decision with respect to other tenure candidates. The Commission needs the requested information in order to proceed with its investigation.

Subpoena Requests Not Affected by this Determination

The Petitioner has stated it will provide the Commission with some of the information requested in Subpoena No. PA-83-029. To the extent that the documents are produced, this Determination will not affect those areas not objected to by the Petitioner.

Petitioner has stated that it agrees to provide the Commission with the information asked for in Subpoena Request No. 1(b), relating to COTE form results, No. 1(c), relating to Grade Surveys and No. 1(d) relating to Enrollment Data. Because of the substantial number of documents involved, the Commission agrees to examine these documents at the offices of the Petitioner.

With respect to Subpoena Request No. 1(f), asking for Governance Evaluation Forms, Petitioner asserts that it does not maintain the requested information. Petitioner will agree to prepare descriptive information concerning its participation in governance for each candidate. The Commission agrees to accept the descriptive information.

Petitioner will partially comply with several requests in Subpoena No. PA-83-029 with respect to Subpoena Request No. 1(g), Petitioner will provide a list of Publications and similar scholarly activities for each candidate. With respct to Subpoena Requests Nos. 1(a), 1(e), 1(h) and 1(j), Petitioner will provide annual evaluation forms and the number of tenured department members "highly recommending" tenure, "recommending" tenure, and "not recommending" tenure in each case together with a disposition of the case and the reasons for the disposition of the Professional Standards Committee.

With respect to Subpoena Request No. 1(i), asking for information on academic advising, Petitioner claims that it does not maintain such information. If any such information exists, the Commission must be given access to it as it is relevant to the issues of job performance and "general contributions".

Petitioner Claims

Petitioner first claims that the Subpoena should be revoked because the Charging Party has failed to allege "any actionable discrimination".

The Petitioner incorrectly relies on a defense that may be argued only before the Court. Petitioner asserts that there is no discrimination because ". . . English language fluency is a permissible consideration as a reasonable, job related criteria of employment." The instant case is not in litigation, it is under investigation by the Commission. The appropriate principle to be applied is that the scope of a Commission investigation is broad. As the

Sixth Circuit held in *Equal Employment Opportunity Commission v. Cambridge Tile Mfg. Co.*, 590 F.2d 205 at 206 (6th Cir. 1979), ". . . the Commission has the power to investigate and thus subpoena documents concerning any employer practice which may shed light on the discrimination."

Second, Petitioner argues that the Commission should not be allowed to obtain the subpoened documents because it has been provided with a written statement of the reasons for the tenure decision. The reasons referred to by the Petitioner are quite general and are in no way responsive to the Subpoena. The letter merely states that tenure was not recommended because of ". . . deficiencies in the areas of scholarship and general contributions." These reasons do not explain what was missing in the Charging Party's "Scholarship" or lacking in his "general contributions" to the college community. In *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979), the Court stated that ". . . a Plaintiff cannot be expected to disprove a Defendant's reasons unless they have been articulated with some specificity." Id. at 1011-1012, n.5.

Furthermore, Petitioner's assertion is contrary to the Commission's Procedural Rules and Regulations, 29 CFR § 1601.12(b) which states that "a charge is sufficient when the Commission receives from the person making the Charge a written statement sufficiently precise to identify the parties, and to describe generally, the action or practices complained of." An allegation which informs the Commission of the practice or violation to be investigated and notifies the Petitioner of what it is required to defend fulfills the requirements of Title VII. *Graniteville Company (Sibley Division) v. Equal Employment Opportunity Commission*, 412 F.2d 462 (5th Cir. 1969); *Circle K Corporation, Inc. v. Equal Employment Opportunity Commission*, 501 F.2d 1052 (10th Cir. 1972).

Viewed in light of the preceding cases, there can be no doubt that the charge submitted by the Charging Party

is sufficient to allow the Commission to pursue its investigation. The Charging Party alleges that he was denied tenure because his French accent was deemed by Petitioner to reduce his ability to effectively communicate in English, thereby in effect discriminating against him because of his national origin. Having received the charge, it is the responsibility of the Commission to conduct an investigation. There is no need to prove the case on the merits at this point.

With respect to Subpoena Request No. 1(k), which asks for the Recommendations of the Professional Standards Committee in each tenure case and Subpoena Request No. 1(l), which asks for the actions taken by the President in each tenure case, the Petitioner claims that the information has already been turned over to the Commission. The Petitioner has provided a list of the names of individuals granted or denied tenure, and a statement that the President accepted the recommendations of the Professional Standards Committee. To conduct a proper investigation, it is necessary for the Commission to have the specific details in each instance that tenure was granted or denied.

With respect to Subpoena Request No. 2, Petitioner claims it provided the Commission with "all information concerning the focus and extent of consideration of Montbertrand's English language competency in the tenure process and complete documentation of the amount of scholarly activity and participation in college governance by Montbertrand." This response to the Subpoena is nonresponsive since the request does not ask for this information.

Additionally, Petitioner claims that it has already provided the Commission with the minutes of the meetings asked for in Subpoena Request No. 2. The Commission has seen the minutes, but was denied the right to copy them. Specifically, Section 709(a), 42 U.S.C. § 2000e-8

(a), grants the Commission and its representatives ". . . access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this title . . ."

Third, with respect to every other request made in Subpoena No. PA-83-029, the Petitioner objects on the basis of relevancy and the qualified academic peer review privilege.

The Petitioner's claims are without merit. The Commission is entitled to access to information relevant to a charge under investigation, § 709(a), 42 U.S.C. § 2000e-8(a), and to the production of information relevant to the charge under investigation, § 710, 42 U.S.C. § 2000e-9. It is the Commission, not the Petitioner that determines what information is relevant and within the scope of the charge. *Equal Employment Opportunity Commission v. University of New Mexico*, 504 F.2d 1296 (10th Cir. 1974).

Petitioner objects to the Subpoena Requests in No. 1(g) for evaluations by outside experts; No. 1(a) asking for Tenure Recommendations Forms; in No. 1(e) asking for the third year review; in No. 1(h) asking for letters of reference; in No. 1(j) asking for all notes, letters, memoranda or other documentation considered during the tenure cases; and No. 3 asking for the minutes of the Professional Standards Committee meetings when tenure decisions were made. In each instance the requested information is relevant and necessary in order that the Commission can determine what areas were considered in making tenure decisions and how the Charging Party compared with other candidates. In analyzing the requests for information, there can be no question that in Subpoena No. PA-83-029, the Commission seeks evidence which under well-established authority, is relevant and within the scope of the investigation of the Charge of

Discrimination. *See, Parliament House Motor Hotel v. Equal Employment Opportunity Commission*, 44 F.2d 1335, 1340 (5th Cir. 1971); and *Blue Bell Boots, Inc. v. Equal Employment Opportunity Commission*, 418 F.2d 355 (6th Cir. 1969).

The Petitioner also claims that, even if relevant, the above mentioned information not made available is protected by the qualified academic peer review privilege. The Petitioner also claims that the information asked for in Subpoena Request No. 2 is protected by the privilege.

The Petitioner's claim is without merit. The Commission is properly proceeding with an investigation which is within its congressionally mandated authority. Under Section 706(b) of Title VII, 42 U.S.C. § 2000e-5(b), the Commission is specifically authorized by statute to conduct investigations to determine if employers are committing unlawful employment practices in violation of Section 703 and 704 of Title VII, 42 U.S.C. § 2000c-2 and 3.

In this action the Charging Party alleges that his national origin was a factor in the decision of the Petitioner to deny him tenure. Therefore, the motivation of the members of the Committee who voted against him is a critical element of his claim. It is a generally accepted principle of law that where confidential information relates to a college's justification for a challenged decision, the Plaintiff's right to a fair opportunity to present his claim must prevail over any general principles of academic confidentiality. *In Re Dinnan*, 661 F.2d 246 (5th Cir. 1981); *Jepsen v. Florida Board of Regents*, 610 F.2d 1379, 1384-85 (5th Cir. 1980).

Petitioner relies on *Gray v. Board of Higher Education, City of New York*, 692 F.2d 901 (2nd Cir. 1980), to support its adoption of the qualified academic peer review privilege. In fact, the court in *Gray* ruled a college cannot use this Privilege to deny the Plaintiff the opportunity to

review the actions of the committee with respect to their decision to grant or deny tenure. At P. 906, the court stated that "[m]erely by furnishing the after-the-fact statement of reasons the Defendants cannot fill the void left by the committee's conclusory decision . . ." The Commission, as the agency empowered by Congress to investigate claims of employment discrimination, has a right to discover the reasons why the "scholarship and general contributions" of the Charging Party are deficient.

Determination

For all the above-stated reasons, it is my determination that the Petition to Revoke or Modify Subpoena No. PA-83-029 is denied. Therefore, in accordance with this Determination, you are directed to produce the documents on Tuesday, September 13, 1983 at 11:00 A.M.

/s/ Johnny J. Butler
JOHNNY J. BUTLER
District Director

DATE: 8/18/83

(3)

No. 85-1439

In the Supreme Court of the United States

OCTOBER TERM, 1985

FRANKLIN AND MARSHALL COLLEGE, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

CAROLYN B. KUHL
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
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JOHNNY J. BUTLER
General Counsel (Acting)
Equal Employment Opportunity Commission
Washington, D.C. 20507

20pp

QUESTION PRESENTED

Whether the Equal Employment Opportunity Commission may have access to information in a college's tenure review files relevant to its investigation of a Title VII charge that the college discriminatorily denied a professor tenure.

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BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. la-25a) is reported at 775 F.2d 110. The order of the district court (Pet. App. 29a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 21, 1985. A petition for rehearing was denied on November 29, 1985 (Pet. App. 26a-28a). The petition for a writ of certiorari was filed on February 27, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States District Court for the Eastern District of Pennsylvania ordered petitioner to comply with a subpoena issued by the Equal Employment Opportunity

Commission (EEOC or Commission) (Pet. App. 29a). The court of appeals affirmed (*id.* at 1a-25a).

1. In June 1981, Gerard Montbertrand, then an Assistant Professor in petitioner's French Department, filed a charge with the EEOC alleging that petitioner violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, by denying him tenure because of his national origin. Montbertrand had been recommended for tenure by his department, but petitioner's Professional Standards Committee, consisting of five elected tenured faculty members and the Dean of the College, subsequently recommended denial of tenure. The Committee's recommendation was adopted by petitioner's dean and president.[1] Montbertrand was advised by the College president that the Committee recommendation against tenure was based upon his "deficiencies in the areas of scholarship and general contributions [which] were not sufficiently offset by performance in other areas". Pet. App. 2a-3a.

The EEOC began its investigation by seeking, through a questionnaire, information about the allegations in the charge. When some of the requested information was not provided, the EEOC issued a subpoena seeking information regarding petitioner's tenure decisions made between November 1977 and July 1983, including tenure recommendation forms prepared by faculty members, annual evaluations, letters of reference, and evaluations of publications by outside experts; notes, letters, and memoranda considered during the tenure deliberations; and minutes of Professional Standards Committee tenure meetings beginning in November 1977. Petitioner refused to provide the

[1]Montbertrand subsequently sought reconsideration by the Committee, which reaffirmed its decision (Pet. App. 3a). He also filed a petition with the College Grievance Committee seeking review of the tenure denial, but his petition was denied (*ibid.*).

bulk of this information, arguing inter alia that the material was protected by a qualified academic peer review privilege. Pet. App. 3a-5a.[2]

2. a. The Commission, after issuing a denial of petitioner's administrative petition to revoke the subpoena (Pet. App. 30a-37a), brought this subpoena enforcement action. The district court ordered the subpoena enforced in its entirety and, with the EEOC's concurrence, allowed petitioner to delete the names of professors and identifying data contained in the material. *Id.* at 5a-6a, 29a.

b. The court of appeals (Pet. App. 1a-25a) affirmed the district court's enforcement order. It first declined to create a qualified academic peer review privilege (*id.* at 6a-10a). The court, following its own precedent, "concluded from the legislative history of Title VII and its amendments that, notwithstanding principles of academic freedom, tenure decisions fall within the intended scope of the Act" (*id.* at 10a (citation omitted)). The court reasoned that " 'Congress must have recognized that in order to achieve its legislative goals, courts would be forced to examine critically university employment decisions' " (*ibid.* (quoting *Davis* v. *Weidner*, 596 F.2d 726, 731 (7th Cir. 1979)).[3]

[2]Petitioner resisted production of documents which relate to Montbertrand's denial of tenure as well as documents relating to other tenure candidates. Petitioner did allow an EEOC investigator to review the minutes of the Professional Standards Committee's consideration of Montbertrand, but now refuses to allow the EEOC any additional access to those minutes. See C.A. App. 63a-64a.

[3]The court of appeals recognized the petitioner's interest in the confidentiality of its peer review process, but concluded that this interest must give way to Congress's mandate that academic employers abide by the strictures of Title VII: "[W]e have no choice but to trust that the honesty and integrity of the tenured reviewers * * * will overcome feelings of discomfort and embarrassment" which may result from the fact that their decisions could be reviewed by the EEOC if challenged as discriminatory (Pet. App. 10a).

The court also declined to require an initial showing by the EEOC of some merit to its charge prior to a disclosure order (Pet. App. 11a-14a). It found petitioner's argument to the contrary to be "inconsistent with the language, history and purpose of Title VII and with Congress' grant of investigatory authority to the EEOC" (*id.* at 11a). It relied explicitly on this Court's decision in *EEOC* v. *Shell Oil Co.*, 466 U.S. 54 (1984), which, it pointed out, made clear that a district court need not find the "charge of discrimination to be well-founded, verifiable, or based on reasonable suspicion before enforcing an EEOC subpoena" (Pet. App. 11a). The court of appeals emphasized that, while neither the EEOC nor the courts may reevaluate a candidate's qualifications, the EEOC's statutorily mandated role is to determine whether there is evidence to support a charge of discrimination. To this end, the peer review materials "must be investigated to determine whether the evaluations are based in discrimination" and the "alleged perpetrator of discrimination cannot be allowed to pick and choose the evidence which may be necessary for an agency investigation" (*id.* at 12a-14a).[4]

ARGUMENT

Petitioner makes two arguments in favor of certiorari: (1) that colleges and universities are entitled to a special privilege exempting them to some (unspecified) extent from the legal proceedings necessary to enforce the civil rights laws

[4]Chief Judge Aldisert dissented (Pet. App. 15a-25a). He expressed the view that the subpoena should be enforced insofar as it seeks tenure review materials regarding the specific decision to deny Montbertrand tenure (*id.* at 24a), but should not be enforced in its entirety until the EEOC has "show[n] that it had established a sufficient factual and legal basis to warrant the serious intrusion into [petitioner's] tenure review process in other cases" (*id.* at 18a). The dissent castigated the majority for "slavish allegiance to conceptual jurisprudence" and failing to "consider the decision's consequence upon the social order" (*id.* at 22a).

and to which most other organizations in this country are subject; and (2) that a conflict exists in how the courts of appeals have treated challenges by academic institutions to civil rights proceedings. But there is no basis for the special privilege petitioner seeks, and any conflict is nascent at best, minor in any event, and likely to recede in light of this Court's recent decision in *EEOC* v. *Shell Oil Co.*, 466 U.S. 54 (1984). Accordingly, further review is not warranted.

1. The court below correctly held that academic peer review materials must be produced by universities if the subpoenaed materials are relevant to a charge of discrimination. The court's rejection of a qualified academic freedom privilege for peer review documents underlying academic tenure decisions accords with the precept that privileges, because they "contravene the fundamental principle that the 'public . . . has a right to every man's evidence,' " are not favored under federal law (*Trammel* v. *United States*, 445 U.S. 40, 50 (1980), quoting *United States* v. *Bryan*, 339 U.S. 323, 331 (1950)). See also *Herbert* v. *Lando*, 441 U.S 153, 175 (1979); *United States* v. *Nixon*, 418 U.S. 683, 709-710 (1974). Consequently, privileges should be accepted " 'only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth' " (*Trammel*, 445 U.S. at 50, quoting *Elkins* v. *United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)). Similarly, in determining whether to create a new privilege it is also appropriate to analyze first whether there are other "important interests at stake in opposing the creation of the asserted privilege" (*Herbert* v. *Lando*, 441 U.S. at 171; see Pet. App. 9a-10a). Adoption of the privilege advocated by petitioner would conflict not only with the fundamental truth-seeking function of the judicial system, but also with the paramount national interest of non-discrimination in

employment (see, *e.g., Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36, 47 (1974)). In declining to create a privilege, the court of appeals properly held that the interest of academic employers in the confidentiality of tenure review evidence was insufficient to overcome this interest.[5]

Certainly, Congress did not contemplate such a privilege under Title VII. In 1972, it extended to educators the same protection Title VII affords other employees (Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 3, 86 Stat. 103-104; see *Kunda* v. *Muhlenberg College,* 621 F.2d 532, 550 (3d Cir. 1980)). Congress removed the exemption for educational institutions based upon its conclusion that "[t]here is nothing in the legislative background of Title VII, *nor does any national policy suggest itself*" to support the exemption (S. Rep. 92-415, 92d Cong., 1st Sess. 12 (1971) (emphasis added)); see also H.R. Rep. 92-238, 92d Cong., 1st Sess. 19-20 (1971); 118 Cong. Rec. 1992 (1972) (remarks of Sen. Williams). Indeed, in extending Title VII to cover institutions like petitioner, Congress rejected arguments similar to those raised by petitioner here (see 118 Cong. Rec. 1993 (1972) (remarks of Sen. Allen) (coverage of educational institutions would "place[] in serious jeopardy" "[a]cademic tenure—the very cornerstone of academic freedom")). Accordingly, Congress intended that "educational institutions, like other employers in the Nation, should report their activities to the Commission and should be subject to the Act" (S. Rep. 92-415, *supra,* at 12) and that the courts and the EEOC "would be forced to examine critically university employment decisions" (*Davis* v. *Weidner,* 596 F.2d 726, 731 (7th Cir. 1979)). See also 42 U.S.C. 2000e-5(b), 2000e-8(a), 2000e-9.

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[5]Cf. *Branzburg* v. *Hayes,* 408 U.S. 665 (1972) (declining to create a privilege for newsmen from grand jury testimony). If a privilege for a newsman is rejected, so should be the suggested privilege for petitioner, whose First Amendment claim here is much more tenuous.

Petitioner proposes indefinite but potentially substantial restrictions on the availability to the Commission and the courts of the information on which it bases its employment decisions. The asserted privilege would make examination of academic employment decisions difficult or impossible and, thus, thwart Congress's explicit direction to the Commission to enforce Title VII against academic employers as vigorously as against all other employers. Without complete information about a challenged employment decision, neither the EEOC nor the courts would be able to determine whether discrimination has played a role in it. Here, for instance, only by examining petitioner's decision-making and its treatment of similarly situated individuals can the Commission determine whether the asserted reasons for the denial of tenure were pretextual and, thus, whether there was discrimination against the charging party. Any requirement that the EEOC make some sort of preliminary showing before obtaining relevant peer review materials would be particularly inappropriate and detrimental to Title VII enforcement (see Pet. App. 24a-25a (Aldisert, C.J., dissenting)). Adoption of such a standard would be contrary to this Court's admonition in *EEOC* v. *Shell Oil Co.,* 466 U.S. 54, 72 n.26 (1984), that "any effort by the court [in a subpoena enforcement proceeding] to assess the likelihood that the Commission would be able to prove the claims made in the charge would be reversible error."

Petitioner's interest in academic freedom will not be affected by a refusal to create the privilege it seeks. Academic freedom in its legitimate sense—the ability of a scholar to express and examine unconventional ideas without fear of reprisal or censure (see *Sweezy* v. *New Hampshire,* 354 U.S. 234, 250 (1957) (plurality opinion); *id.* at 262-263 (Frankfurter, J., concurring))—is not seriously implicated by Commission or court review of the peer review process

for evidence of unlawful discrimination.[6] Indeed, if academic freedom were construed to require complete secrecy of the process, "it would rapidly become a double-edged sword threatening the very core of values that it now protects" (*In re Dinnan,* 661 F.2d 426, 430 (5th Cir. 1981)). Any constitutional guarantees that protect the university's selection of faculty exist to protect its right to select educators " 'on academic grounds' " (*Sweezy* v. *New Hampshire,* 354 U.S. at 263 (Frankfurter, J., concurring) (citation omitted)); they cannot be used as a shield when the charge under investigation is precisely that the tenure decision was not made on academic grounds, but on the basis of sex, race, or national origin (*Gray* v. *Board of Higher Education,* 692 F.2d 901, 909 (2d Cir. 1982); *In re Dinnan,* 661 F.2d at 430; see also *EEOC* v. *University of Notre Dame du Lac,* 715 F.2d 331, 337 (7th Cir. 1983); cf. *Hishon* v. *King & Spalding,* 467 U.S. 69, 78 (1984); *id.* at 81 (Powell, J., concurring)).[7]

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[6]There are numerous cases in which courts have reviewed peer review materials to determine whether an institution's asserted reasons for its decision were mere pretext masking discrimination, without apparent harm to the peer review process (or, apparently, even objection from the university). See *Craik* v. *Minnesota State University Bd.,* 731 F.2d 465, 482-483 (8th Cir. 1984); *Zahorik* v. *Cornell University,* 729 F.2d 85, 89-91 (2d Cir. 1984); *Banerjee* v. *Board of Trustees,* 648 F.2d 61, 64 n.5 (1st Cir.), cert. denied, 454 U.S. 1098 (1981); *Smith* v. *University of North Carolina,* 632 F.2d 316, 323-331 (4th Cir. 1980); *Kunda* v. *Muhlenberg College,* 621 F.2d at 544-546; *Manning* v. *Trustees of Tufts College,* 613 F.2d 1200, 1203 (1st Cir. 1980); *Sweeney* v. *Board of Trustees,* 604 F.2d 106, 112 (1st Cir. 1979), cert. denied, 444 U.S. 1045 (1980); *Scott* v. *University of Delaware,* 601 F.2d 76, 81 (3d Cir.), cert. denied, 444 U.S. 931 (1979); *Powell* v. *Syracuse University,* 580 F.2d 1150, 1152, 1156 (2d Cir.), cert. denied, 439 U.S. 984 (1978).

[7]Accordingly, petitioner's citations (at 13, 15) to *Sweezy* and *Keyishian* v. *Board of Regents,* 385 U.S. 589 (1967), are inapposite. Nor do the other cases discussing academic freedom cited in the petition (at 12-15) support petitioner's argument. Justice Powell's concurrence in *Regents of the University of California* v. *Bakke,* 438 U.S. 265, 312 (1978), involved the permissibility of diversity as a university goal for its student body—not immunization from Title VII discovery. Cf. *Bob Jones University* v. *United States,* 461 U.S. 574, 604 (1983). In *Regents of the University of Michigan* v. *Ewing,* No. 84-1273 (Dec. 12, 1985), the Court was faced not with a discrimination claim, but a substantive due process claim asking the Court to review the academic decision itself, not to determine whether an impermissible factor such as race or national origin influenced the decision. While stating its reluctance to second guess the decision by a university not to allow a student to retake an exam, the Court clearly left open the possibility that review in a case like the instant one would be warranted (slip op. 11 (emphasis added; footnote and citation omitted)):

> When judges are asked to review the substance of a *genuinely academic decision,* such as this one, they should show great respect for the faculty's professional judgment. Plainly they may not override it *unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.*

In short, there can be no serious contention that the holding below conflicts with decisions of this Court. This Court has never suggested that academic freedom limits enforcement of Title VII. Rather, this Court consistently has recognized Congress's judgment that the elimination of discrimination in employment is a national priority of the highest order. See, *e.g., Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36, 47 (1974).

Finally, enforcement of the subpoena will involve only a minimal infringement upon the college's interest in confidentiality. Petitioner may delete the names and identifying characteristics of peer reviewers from the records to be disclosed. Moreover, there will be no public disclosure as a result of compliance with the subpoena. Enforcement of the subpoena merely requires petitioner to provide its records to the agency authorized by Congress to receive them. The EEOC is, under threat of criminal penalities, specifically prohibited from publicly disclosing such records (see 42 U.S.C. 2000e-8(e)).[8] And once litigation commences, if it

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[8]The only disclosure permitted is to charging parties in contemplation of litigation, to witnesses where disclosure is deemed necessary for securing appropriate relief, or to interested governmental agencies (29

does, a defendant, university, or college can protect itself against disclosure by securing a protective order (see *EEOC* v. *University of Notre Dame du Lac,* 715 F.2d at 340; *EEOC* v. *Bay Shipbuilding Corp.,* 668 F.2d 304, 312 n.9 (7th Cir. 1981); *Jepsen* v. *Florida Board of Regents,* 610 F.2d at 1385)).

2. Although, as petitioner states, the courts of appeals have professed various stands on whether an academic privilege could ever be recognized, every appellate court but one to face the question has ruled that the Commission's or a plaintiff's need for relevant information to prove a discrimination claim outweighed the academic institution's interest in nondisclosure. See *Gray* v. *Board of Higher Education,* 692 F.2d 901 (2nd Cir. 1982) (court declined to recognize a privilege and, applying a "balancing" test, ordered disclosure of tenure committee votes); *In Re Dinnan,* 661 F.2d 426 (5th Cir. 1981), cert. denied, 457 U.S. 1106 (1982) (privilege rejected; court affirmed order in employment discrimination suit finding member of tenure committee in contempt for his refusal to disclose vote); *Lynn* v. *Regents of the University of California,* 656 F.2d 1337, 1346-1349 (9th Cir. 1981), cert. denied, 459 U.S. 823 (1982) (in dictum, court strongly suggested that tenure review file, including peer evaluations, be disclosed to plaintiff on remand); *Jepsen* v. *Florida Board of Regents,* 610 F.2d 1379, 1384-1385 (5th Cir. 1980) (disclosure of faculty evaluation forms of other professors ordered). See also *Keyes* v. *Lenoir Rhyne College,* 552 F.2d 579, 581 (4th

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C.F.R. 1601.22). See also *EEOC* v. *Associated Dry Goods Corp.,* 449 U.S. 590 (1981). Even this limited disclosure is further circumscribed by the Commission's procedures. Before disclosing any information, the Commission requires of each potential recipient a signed agreement not to disclose the information "except in the normal course of a civil action or other proceeding instituted under Title VII" (EEOC Compliance Manual § 83.4(b) (CCH) ¶ 1784, at 1421-1422 (Apr. 1986)).

Cir.), cert. denied, 434 U.S. 904 (1977) (in dictum, the court said that "if the College had sought to justify any male-female disparity on the basis of these [confidential peer] evaluations the plaintiff should have been granted the opportunity to use them"). There is, accordingly, no need for the Court to resolve any conflict among the standards articulated by these courts.[9] In the only case decided in favor of a university on this issue, *EEOC* v. *University of Notre Dame du Lac,* 715 F.2d 331, 338 (7th Cir. 1983), the court's holding was that the university could delete names and identifying data from its tenure review files before disclosing them to the Commission.[10] The issue of whether a privilege protects the production of unredacted files is not presented here, because disclosure of redacted files is all that has been ordered in this case.[11] Thus, no clear conflict has emerged in

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[9]Some of these cases, notably *Gray,* are distinguishable as well because they do not involve the EEOC's Title VII subpoena authority. See *Gray,* 692 F.2d at 905; cf. *University of Notre Dame du Lac,* 715 F.2d at 337 n.3. Thus, not only did the Second Circuit decline to create a privilege (692 F.2d at 904), it declined to do so in a discovery situation where it had more flexibility than had it been faced with the Commission's explicit statutory mandate.

[10]The Seventh Circuit stated, in dictum, that "there must be substance to the charging party's claim and thorough discovery conducted before even redacted files are made available" (715 F.2d at 337 n.4). The notion that a charge must be shown to have some merit before a court can enforce an EEOC subpoena seeking documents relevant to the charge was rejected in *EEOC* v. *Shell Oil Co.,* 466 U.S. 54, 71-72, 77, 81 (1984); *id.* at 93-94 (O'Connor, J., concurring in part and dissenting in part), which was issued after the Seventh Circuit's ruling in *Notre Dame.* Indeed, the Court said that requiring such a showing "would be reversible error" (*id.* at 72 n.26). See also *United States* v. *Arthur Young & Co.,* 465 U.S. 805, 815-817 (1984) (also decided after *Notre Dame*).

[11]Moreover, as a general matter, the assertion of academic privilege by defendant in *Notre Dame* was considerally more modest in scope than it is here.

the circuits regarding an academic employer's obligation to provide peer review materials in response to either a Commission subpoena or a private plaintiff's discovery in a discrimination action.

Indeed, the EEOC would be entitled to production of this evidence under any of the standards articulated by the courts of appeals. Those circuits that balance a plaintiff's need for disclosure against an academic employer's interest in confidentiality have indicated that the balance tips in favor of disclosure of peer review information relevant to a claim of discrimination where the academic employer relied upon the requested material in making the tenure decision (see *Gray,* 692 F.2d at 905-906 ("[i]f the defendant's claim that the tenure denial was based on evaluations of [plaintiff's] performance discussed at the [committee] meeting, then certainly [plaintiff] will be hamstrung if denied disclosure"); and *Lynn* v. *Regents of the University of California,* 656 F.2d at 1347). Here, petitioner claimed that it refused to award Mr. Montbertrand tenure because of, for instance, deficiencies in his research. In order to determine whether this was in fact petitioner's reason, and not a pretext, the Commission needs to examine the evaluations upon which petitioner relied and to compare them with evaluations of similarly situated tenure candidates. Similarly, disclosure would be ordered even if the Seventh Circuit's "particularized need" standard (*EEOC* v. *University of Notre Dame du Lac,* 715 F.2d at 338) were applied. Inasmuch as the information is not available from any other source and is critical to EEOC's ability to conduct an adequate investigation, "the need of the party seeking disclosure outweighs the adverse effect such disclosure would have on the policies underlying the privilege" (*ibid.* (citations omitted)). See *Langland* v. *Vanderbilt University,* 589 F. Supp. 995, 1008 (M.D. Tenn. 1984) (citation omitted) ("even those courts which profess to recognize such [an academic] privilege

require production of the files when the defendants rely upon the evaluations contained in them to justify their actions"), aff'd, 772 F.2d 907 (6th Cir. 1985) (Table).

The differences in professed approaches in the cases cited by the petitioner do not rise to the level of an actual conflict; as discussed, they have not led to different results so far. Moreover, whatever nascent conflicts there may be in the circuits will not be a problem at all for a given college, which necessarily will have only one circuit standard with which to deal. The EEOC, for whom alone a lack of national uniformity would pose problems, is willing to wait and see whether a practical conflict does develop, particularly in light of this Court's intervening decision in *EEOC* v. *Shell Oil Co.* If the Seventh Circuit (or another court of appeals) ignores *Shell Oil,* and a practical conflict does develop, it can be resolved at that time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1986

DOJ-1986-05

No. 85-1439

(5)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

FRANKLIN AND MARSHALL COLLEGE,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

The Third Circuit held that confidential peer review materials of a liberal arts college enjoy no First Amendment protection from an EEOC administrative subpoena and ordered petitioner to provide the government with all confidential materials relating to every faculty tenure decision made during the four-year period of Montbertrand's employment with the College. Petitioner seeks plenary review because, as the Third Circuit itself recognized, its rule of law is in sharp contrast to the rules announced by two other circuit courts and because, by according petitioner's First Amendment rights no weight, the Third Circuit's decision is in conflict with decisions of this Court. The EEOC does not and could not dispute that the rules announced by the courts of appeals are in conflict and that petitioner's First Amendment rights, although infringed by the blanket EEOC subpoena, were accorded no weight by the court below.

Given these concessions, petitioner frankly would have expected the EEOC to acquiesce in the petition and ask the Court to grant certiorari in this case. Instead, the EEOC has lamely asked the Court to postpone reviewing this issue until some future case; its reasons for this suggestion warrant a brief reply.

1. In its brief, the EEOC ignores the court of appeals' express statement that its rule of law departed fundamentally from the approach taken in both the Second and Seventh Circuits. Pet. App. 8a. Nor does the EEOC deny that the basic approach taken in the Seventh and Second Circuits—both in recognizing that the First Amendment in some measure protects confidential tenure deliberations and in balancing, either directly or through a limited privilege, the First Amendment interest in confidentiality against the government's need for discovery—conflicts sharply with the analysis of the court of appeals in this case. See *EEOC* v. *University of Notre Dame Du Lac*, 715 F.2d 331, 337 (7th Cir. 1983); *Gray* v. *Board of Higher Education*, 692 F.2d 901, 903 (2d Cir. 1982). See Pet. 9-12. Indeed, the EEOC concedes that the tests in the three circuits are in conflict. Opp. 10 ("varying" standards).

The government instead argues that the conflict does not warrant review by this Court for three reasons. First, it asserts that the conflict is "nascent." Opp. 5, 13. But, the EEOC does not explain why a *new* conflict in the circuits on a significant and recurring issue involving a First Amendment right is somehow undeserving of review by this Court. The EEOC never explains what this Court will gain by allowing the concededly unsettled state of the law to continue unresolved.

Why, then, should the government oppose certiorari in this case? There can be only one explanation. The government would prefer to have this Court decide this question of such obvious importance in a case in which the record does not so starkly demonstrate the extreme nature of the government's legal position. This record contains no evidence that Franklin and Marshall discriminated against Montbertrand because he is French. The brief in opposition points to no such evidence and there is none. What the record does show is that statistically Franklin and Marshall's tenure decisions have significantly favored foreign origin professors (Pet. 6 n.3), and that the decision on Montbertrand was based on his inadequate scholarship and other objective factors, of which he was informed.

The EEOC's rationale for ignoring the legitimate concerns of every college and university in the country to achieve uniformity in the scope of their First Amendment rights is even more incredible. According to the EEOC, the conflict in the circuits "will not be a problem" because each college "will have only one circuit standard with which to deal." Opp. 13. This rationale, of course, would eliminate the need for this Court ever to resolve a conflict among the circuits. Surely the government would not contend that a conflict-creating individual income tax decision should not be reviewed because the taxpayer lives in only one circuit. Moreover, the EEOC's position ignores the fact that most circuits have not decided the issue presented in this case, which means that academic institutions in those areas must labor under continued needless uncertainty waiting for the existing conflict among the circuits to age and that the other courts of appeals must waste scarce judicial resources deciding, in the absence of direction from this Court, which of the three conflicting approaches is correct. Finally, the EEOC makes no attempt to explain why the First Amendment's protections of academic freedom should turn solely on the fortuity of geography.

Second, the EEOC asserts (Opp. 11-12) that the subpoena in this case would have been enforced in both the Second and Seventh Circuits and therefore the Court can disregard the clear conflict in the legal standards and constitutional protections. But no other court of appeals

has ever ordered the wholesale disclosure of all confidential files for all candidates considered for tenure during the period of the charging party's employment.[1] Thus, this contention is purely speculative.

The argument is also incorrect. In *Gray*, the Second Circuit expressly stated that even the minimal intrusion into academic freedom authorized there (disclosure of names of tenure committee members) would not have been ordered if, as here, the academic institution had supplied the charging party with a statement of reasons for the denial of tenure. 692 F.2d at 906-908; Pet. 11. Under that reasoning there is no way the Second Circuit would have enforced the blanket subpoena issued by the EEOC here.

In *Notre Dame*, the University objected to the release of files unless they were "redacted," i.e., names and identifying characteristics could be removed by the University before disclosure. The court of appeals granted all the relief sought and only authorized release of redacted files because Notre Dame, which is many times larger than Franklin and Marshall,[2] had not objected to their release in that form. In so doing, the court of appeals made it clear that "there must be substance to the charging party's claim and thorough discovery conducted before even redacted files are made available [to the EEOC]." 715 F.2d at 337 n.4. No such initial showing has been made here, and therefore, the EEOC is plainly incorrect

[1] The EEOC incorrectly states that no court, except the Seventh Circuit, has upheld a claim that the academic institution's interests outweighed "a plaintiff's need for relevant information to prove a discrimination claim. . . ." Opp. 10. The Fourth Circuit in *Keyes* v. *Lenoir Rhyne College*, 552 F.2d 579, 581, cert. denied, 434 U.S. 904 (1977), upheld the district court's refusal to permit the plaintiff to discover the College's tenure review materials on a college-wide basis.

[2] The EEOC has ignored the uncontested claim of the petitioner that redaction is a meaningless protection for a college as small as Franklin and Marshall.

in arguing that the Seventh Circuit would have enforced the subpoena in this case under its qualified privilege test.

In sum, the only way to determine whether petitioner's confidential records would be disclosed under the constitutional standards used in other courts of appeals is for this Court to grant the petition, reject the loose relevance standard employed below and subject the files to the more rigorous scrutiny employed in the Second and Seventh Circuits.

Finally, the EEOC implies (Opp. 13) that this Court's "intervening" decision in *EEOC* v. *Shell Oil Co.*, 466 U.S. 54 (1984), might cause the courts of appeals to rethink their rules which restrict the EEOC's access to confidential tenure information. But *Shell Oil* merely construed Title VII and its implementing regulations; it did not involve any claim based on the First Amendment and the Court was not asked to resolve the tension between any constitutional rights and Title VII. Thus, *Shell Oil* is totally irrelevant to the question presented in this case of how to reconcile the tension between the First Amendment right to confidential tenure deliberations and the broad sweep of Title VII. See Pet. App. 15a, 24a-25a (Aldisert, C.J., dissenting).

2. Alternatively, the EEOC attempts to argue the merits of this case and defends the judgment below as correct. Opp. 4-10. In light of the conflict among the circuits, this argument is beside the point. Only this Court can settle the conflict. In any event, because it gave *no* weight to petitioner's First Amendment interests, the decision below is clearly incorrect under the decisions of this Court.[3]

[3] The EEOC completely mischaracterizes petitioner's argument. Petitioner has not sought any "exemption" or "immunity" from any legal proceedings under Title VII. Opp. 4, 9 n.7. Respect for petitioner's First Amendment rights merely requires the EEOC to investigate non-confidential materials first and to make some initial

In arguing in favor of the holding of the court of appeals, the EEOC does not clearly explain its view concerning the scope of or even the existence of any First Amendment protection for academic freedom. Nevertheless, the EEOC does not directly dispute petitioner's argument, set out at some length in the petition (Pet. 13-15),[4] that academic freedom is protected by the First Amendment and that confidential tenure deliberations are a critical element of that right.[5]

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showing of need before issuing a blanket subpoena for confidential tenure materials, such as the one in this case. The fact that Congress extended Title VII to academic institutions (Opp. 6) is thus wholly irrelevant to the narrower issue of what type of protection from discovery these institutions enjoy. On that issue Congress was silent.

[4] The EEOC's suggestion that "academic freedom in its legitimate sense" is limited to "the ability of a scholar to express and examine unconventional ideas without fear of reprisal or censure" (Opp. 7) completely ignores statements by members of this Court consistently identifying the freedom to decide "who shall teach" as one of the four constituent elements of academic freedom protected by the First Amendment. (See cases cited at page 13 of the Petition.)

[5] The EEOC makes a spurious comparison between this case and *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), and claims that rejection of the newsman's claim there warrants rejection of any privilege "for petitioner, whose First Amendment claim here is much more tenuous." (Opp. 6 n.5). This assertion is peculiar in light of the government's complete failure to analyze petitioner's First Amendment claims. Moreover, the reasoning in *Branzburg* supports petitioner. As Justice Powell's pivotal opinion explained, "The asserted claim to privilege should be judged on its facts by the striking of *a proper balance* between [First Amendment] freedom . . . and the obligation of all citizens to give relevant testimony. . . ." 408 U.S. at 710 (emphasis added). In *Branzburg*, reporters refused even to appear before the grand jury. Here, Franklin and Marshall has supplied the EEOC with extensive information in response to the subpoena. In this case, by contrast to *Branzburg*, it is the government which makes the extreme argument that it has no duty to examine initially material already revealed to it or to make any preliminary showing of need before obtaining access to confidential tenure materials protected by the First Amendment.

The EEOC even concedes (Opp. 9) that First Amendment-protected academic rights will be infringed by uncontrolled access to tenure review materials, but maintains that such infringement will be "minimal." This is contrary to common sense. As we indicated in the petition (at 14), this Court has repeatedly recognized that confidentiality is critical to many deliberative activities. As applied in the academic setting, the views of the American Association of University Professors, which itself supports both the need for confidentiality in the tenure process and the need to proscribe invidious discrimination in that process, would seem to be a better guide to follow than the EEOC. In its *amicus* brief, the AAUP argues that "[u]nfettered disclosure of faculty evaluations will thus serve to reduce the reliability of the evaluations themselves to the serious detriment of standards of excellence in higher education." AAUP Br. 12.

Even the Third Circuit in effect conceded that its rule would infringe academic freedom. The court recognized "that confidentiality in the peer review system plays an important role in obtaining candid, honest assessments of the candidates under review." Later, the Court acknowledged that disclosure could lead to "embarrassment, confrontational situations and the fear of less than honest evaluations . . . ." Pet. App. 8a. See also *id.* at 10a.[6]

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[6] Without commenting upon this statement by the court of appeals, the EEOC asserts (Opp. 9) that it will protect the secrecy of petitioner's tenure materials. But the EEOC admits (Opp. 9 n.8) that its regulations authorize disclosure of information to the charging party which renders any promise of confidentiality completely meaningless. Moreover, this Court in other contexts has rejected similar promises of non-disclosure as inadequate to justify unrestrained access to confidential information. See *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418, 432 (1983) (fear of inadvertent or illegal release of grand jury materials supports "particularized need" requirement for disclosure to Justice Department Civil Division employees).

This is unquestionably an infringement of the confidential deliberative process.

As we argued in the petition (15-16), if the government's demand for information infringes a constitutional right, this Court has held in a variety of contexts that the government must make some additional showing of need beyond loose relevance to justify the constitutional infringement; a court enforcing a subpoena must give some weight to First Amendment rights.[7] The weakness of the government's position on this point is most clearly revealed in its attempt to defend unlimited access to the confidential files of those candidates for tenure at Franklin and Marshall, other than Montbertrand. The government's "need" is explained (Opp. 7) as necessary to allow the EEOC to "determine whether the asserted reasons for denial of tenure were *pretextual* and, thus, whether there was discrimination against the charging party." This claim places the cart before the horse. Before "pretext" becomes an issue, there must be a *prima facie* showing of discrimination. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802-805 (1973). Thus, these materials are not useful in proving the basic discrimination charge. They might be relevant to the case, but only if there is evidence of discrimination. The

[7] The Government's reliance on *Regents* v. *Ewing*, No. 84-1273 (Dec. 12, 1985), is misplaced because it assumes the ultimate issue in this case—that the peer review and promotion or non-promotion of Montbertrand did not involve "genuine avademic decisions." But courts generally should give deference to the academic process unless there has been "such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." (Opp. 9 n.7, quoting from *Regents* v. *Ewing*). Nothing in this record suggests any departure, substantial or otherwise, from academic norms. *Ewing* thus undermines the EEOC's position in this case.

EEOC never explains why access to this evidence is needed before any other investigation is undertaken.[8]

The EEOC has completely refused to accept any limitation on its subpoena power.[9] And, only by ignoring petitioner's First Amendment rights can the EEOC and the Third Circuit justify the premature and unnecessary intrusion into petitioner's academic freedom created by the subpoena in this case. Once there is conceded infringement of protected First Amendment activity, the decisions of this Court forbid giving no weight to the right affected as the court of appeals incorrectly did in this case.

[8] The EEOC string cites "numerous cases" where the issue was whether an academic institution's asserted reason for making a particular decision was "pretextual" and the EEOC asserts that those courts reviewed peer review materials "without apparent harm to the peer review process." Opp. 8 n.6. None of these cases involved judicial enforcement of an administrative subpoena seeking confidential tenure materials. Indeed, none of those cases explains how the "peer review materials" were obtained by the private litigant. Moreover, it is not clear that any of the quotations by peers relied upon by the courts in those cases came during the confidential deliberative process or were instead statements made in other contexts. Finally, none of those cases does what the EEOC wants to do here—rely upon peer review materials concerning a candidate *other* than the complaining or charging party. Thus, those cases are wholly irrelevant to any issue in this case.

[9] The EEOC asserts (Opp. 7) that any restriction upon its access to confidential peer review materials would make Title VII enforcement "difficult or impossible." Restrictions on access to tenure review materials have been in effect in at least two circuits in recent years, but the EEOC does not cite even a single instance where the limitation imposed by those courts has in anyway adversely affected its enforcement efforts.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

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May 6, 1986

No. 85-1439 (2)

In the Supreme Court of the United States

October Term, 1985

FRANKLIN AND MARSHALL COLLEGE,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

BRIEF OF 27 COLLEGES AND UNIVERSITIES AS AMICI CURIAE IN SUPPORT OF PETITION

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Lancaster Bible College
Medical College of Pa.
Moravian College
Duquesne University of the Holy Ghost
Muhlenberg College
New York University
Pennsylvania State System of Higher Education
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Rutgers, The State University of New Jersey

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FRANKLIN AND MARSHALL COLLEGE,

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v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

BRIEF OF 67 COLLEGES AND UNIVERSITIES AS AMICI CURIAE IN SUPPORT OF THE PETITION

INTEREST OF THE AMICI CURIAE

Amici Curiae respectfully submit the within brief in support of the petition for a writ of certiorari, the written consent of each party having been obtained and filed with the clerk of this Court.

Amici curiae are an ad hoc group of 67 colleges and universities representing a broad cross-section of American post-secondary educational institutions. Although this group includes institutions of varying sizes, types, and locations, each amicus is concerned because, as the Court of Appeals for the Third Circuit admitted, its decision will be the "demise" of the confidentiality of the peer review tenure selection process which has served our nation's educational institutions well throughout their history. In this case, the Third Circuit ordered that previously confidential peer-group tenure evaluation materials from throughout the institution must be made available to the EEOC in

connection with a charge that a single instructor had been discriminated against due to his French national origin.[1]

The Third Circuit's 2-1 panel decision holding that the confidentiality of faculty tenure decisions is to be swept away—while refusing to balance this historic First Amendment freedom against a federal agency's request for information only loosely related to the change before it—arose at a small, private institution in Pennsylvania. Although that small college, Franklin & Marshall, has only approximately 134 faculty members and 1,900 students, the decision is making a large impact at other institutions throughout the country.

Many of the amici curiae are institutions similar in size to Franklin & Marshall. They wish to join in urging this Court to review this case because, due to their size, they could not afford to litigate alone against a governmental agency intent, even inadvertently, upon destroying the collegial nature of their institutions. These amici, similar in size to Franklin and Marshall, include Upsala College, Saint Joseph's University, King's College, Juniata College, Moravian College, Ursinus College, Lafayette College, Beaver College, Westminster College, and Muhlenberg College.

The Third Circuit's decision, however, is of equal, if not greater, concern to large institutions with many thousands of students and literally hundreds of faculty members. These amici include Rutgers, The State University of New Jersey, Pennsylvania State University, the

[1]The EEOC would then be free to give the confidential materials relating to faculty members throughout the institution to the instructor who protested his denial of tenure, *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590 (1981), and the confidentiality of the institution's entire tenure system would be destroyed.

University of Pittsburgh, Fairleigh Dickinson University, Widener University, and the fourteen institutions which comprise the Pennsylvania State System of Higher Education.

To these large institutions, it is apparent that the Third Circuit's ruling compelling the disclosure of all confidential tenure materials from throughout the institution for a multiple year period upon the request of a single disgruntled instructor will destroy quickly the confidentiality necessary to the operation of the tenure process. Moreover, it will create a paperwork nightmare and require hundreds of hours of response time even when the requested materials are not likely to be related to a particular tenure decision, each of which is unique.

Other amici have joined in this brief to urge this Court to review the Third Circuit's decision because the decision has raised concerns outside the confines of the Third Circuit. This decision, which conflicts with prior decisions by the Second and Seventh Circuits and which represents a major departure from related decisions by or within the Fourth, Fifth, and Ninth Circuits as well, is of nationwide importance and merits review by this Court for that reason.

Amici from outside the Third Circuit which have joined in this request that this Court review the Third Circuit's decision include the University of Arizona, Arizona State University, Northern Arizona University, New York University, the University of Michigan, Illinois State University, Northern Illinois University, Sangamon State University, Santa Clara College (California), the Texas State Technical Institute, and the nine institutions which comprise the University of California.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, *AMICUS CURIAE*, IN SUPPORT OF THE PETITION

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BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, *AMICUS CURIAE*, IN SUPPORT OF THE PETITION

The American Association of University Professors files this brief *amicus curiae* in support of the Petition for Writ of Certiorari with the consent of both parties.

INTEREST OF THE AMICUS

The American Association of University Professors (hereinafter "AAUP" or the "Association") is a national membership organization of 50,000 faculty members and research scholars in all the academic disciplines. Founded

in 1915, it is the nation's oldest and largest body dedicated to the advancement of higher education from the perspective of faculty concerns.

One of AAUP's principal tasks, frequently undertaken in collaboration with other higher education organizations, is the formulation of national standards for the academic community. AAUP policy statements address the protection of academic freedom and tenure, procedural standards for the renewal of faculty appointments, the faculty role in institutional governance, the elimination of discrimination, and many other facets of academic life.[1] State and federal courts throughout the country, including this Court, have frequently referred to AAUP policy statements in resolving disputes involving faculty members, their institutions, and their students.[2] The Association participates in litigation as *amicus curiae* on a selective basis and makes here a rare appearance concerning a petition for writ of certiorari.

AAUP has long been concerned with the integrity of procedures for the award of tenure and the renewal of probationary faculty appointments. It has promulgated policy statements on these matters which serve as models for the academic community.[3] An essential ingredient in

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[1] The major AAUP policy statements are compiled in AAUP POLICY DOCUMENTS AND REPORTS (1984), a copy of which is in the collection of the Supreme Court library. The AAUP statements referred to herein may be found in this volume unless otherwise referenced.

[2] *E.g., Delaware State College v. Ricks*, 449 U.S. 250, 264 n.3 (1980) (Stewart, J., dissenting); *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 579 n.17 (1972); *Gray v. Board of Higher Educ.*, 692 F.2d 901, 907 (2d Cir. 1982).

[3] The seminal 1940 *Statement of Principles on Academic Freedom and Tenure*, prepared jointly by AAUP and the Association of American Colleges, is the "most widely-accepted academic definition of tenure." *Krotkoff v. Goucher College*, 585 F.2d 675, 679 (4th Cir. 1978). Over one hundred educational organizations and

procedures concerning faculty appointments and tenure is the exercise of judgment by senior faculty colleagues. The academic community takes as a fundamental premise that colleagues and fellow specialists are best able to assess the scholarly contributions and potential of individual faculty members. The 1966 *Joint Statement on Government of Colleges and Universities*, formulated by AAUP, the American Council on Education, and the Association of Governing Boards of Universities and Colleges, states that the faculty has the primary role in making decisions about the status of faculty appointments. This "peer review" process places in the hands of faculty members the basic responsibility for determination in matters of appointment, reappointment, and the award of tenure. Full candor and cooperation are essential to the process, and faculty members rely on the strong tradition of confidentiality protecting this exchange of professional opinion.[4]

Coupled with the Association's concern about procedures for faculty evaluation is its historic commitment to the elimination of discrimination based on national origin, race, sex, and other factors not directly relevant to professional performance. AAUP's 1976 *Statement on Discrimination* condemns such bias in the academic community.

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learned societies have endorsed the 1940 *Statement*. In 1971 the Association adopted the derivative *Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments* setting forth procedures to safeguard against decisions adversely affecting a faculty member that would be violative of academic freedom, impermissibly discriminatory, or based on inadequate consideration. *See Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 579 n.17 (1971).

[4] *See* "Report of the Committee on Confidentiality in Matters of Faculty Appointments," U. CHI. REC. 165 (May 22, 1979); "Confidentiality of College and University Faculty Personnel Files; Its Appropriate Role in Institutional Affairs," American Council on Education (1981).

The official interests of AAUP thus extend both to the unsuccessful candidate for tenure or renewal of appointment who reasonably alleges that the decision-making process was tainted by discrimination and also to the faculty members charged with primary responsibility for evaluation of the candidate. Cases such as the instant one bring into conflict the values of eliminating discrimination in the peer review process, on the one hand, and protecting the candid expression of opinion by faculty peers, on the other. As fully described in the argument section below, in 1980 the Association examined these respective interests and reached an accommodation of them in its *Preliminary Statement on Judicially Compelled Disclosure in the Nonrenewal of Faculty Appointments*, reprinted as Appendix A. By virtue of its appreciation of the central conflicting considerations here, which have been thoroughly analyzed within the Association, AAUP is uniquely qualified to address the Court as *amicus curiae*.

REASONS FOR GRANTING THE WRIT

Introduction and Summary of Argument

This case juxtaposes competing interests of the vindication of civil rights and the institutional autonomy required by colleges and universities to discharge their missions of exploring and disseminating knowledge. The recurring question of whether an institution must divulge information related to a tenure decision in response to an unsuccessful candidate's civil rights claim has provoked an acknowledged conflict in the circuits. The resulting disarray in the state of the law has left the academic community unsure of its individual and collective rights and responsibilities.

Amicus AAUP takes no position at present on whether, given the facts of the case, Franklin and Marshall College should be compelled to comply with the EEOC's subpoena. We challenge rather the legal standard adopted

by the court of appeals, which pays little beyond lip service to the legitimate needs of institutions of higher learning in arriving at sound academic decisions. We argue below that the decision exacerbates an existing conflict in the circuits. The federal question is one of great significance to the American professoriate and the larger society, bearing on standards of excellence in institutions of higher learning and on fair individual treatment. Absent review by this Court, the issue will continue to vex the academic community and the lower courts as vigorous civil rights enforcement efforts continue. The resulting uncertainty over the boundaries of confidentiality in the peer review process will impede the candid exchange of views, to the detriment of the process.

We argue further that, even apart from the conflict in the circuits, the decision below is flawed on both practical and legal grounds. From the standpoint of sound academic policy, it articulates a rule excessively undermining the legitimate, although not absolute, confidentiality protecting faculty evaluation processes. From the standpoint of legal precedent, it deviates from decisions of this Court emphasizing the need to weigh governmental intrusions in academic affairs against values of academic freedom and institutional autonomy under the First Amendment. Amicus AAUP urges the Court to grant review, to fashion a constitutionally sufficient standard for application by the lower courts throughout the country.

ARGUMENT

A. The Conflict in the Circuits. As the Third Circuit recognized, its decision cannot be reconciled with the different approaches of the Second and Seventh Circuits to requests for disclosure of peer review materials. While the Third Court simply ruled that the EEOC's wide-ranging subpoena should be enforced *in toto* because of the broad powers which Congress conferred on the Commission, the Second and Seventh Circuits have, in con-

trast, accorded some degree of protection to faculty members exercising candid judgment in the peer review process. In *Gray v. Board of Higher Education*, 692 F.2d 901 (2d Cir. 1982), in which AAUP participated as *amicus curiae*, the Second Circuit adopted a balancing test weighing the need for disclosure against the institution's interest in confidentiality. The Seventh Circuit took a slightly different tack, erecting a "qualified academic freedom privilege" protecting the peer review process, which may be overcome by a substantial showing of "particularized need" for the information. *EEOC v. University of Notre Dame Du Lac*, 715 F.2d 331, 337, 338 (7th Cir. 1983).

The Third Circuit, in contrast, is now aligned with the Eleventh Circuit, which was the first court of appeals to address the issue. In *In Re Dinnan*, 661 F.2d 426 (11th Cir. 1981), *cert. denied*, 457 U.S. 1106 (1982), the court ordered disclosure of information without regard to the need for confidentiality in the peer review process. Thus, as aptly pointed out by Franklin and Marshall College in its petition for writ of certiorari, we now have three different standards employed by four courts of appeals for deciding whether tenure review materials must be divulged in connection with a civil rights claim by an unsuccessful candidate.[5] Petition, p. 8.

Given the nature of the issue, it would appear to be simply a matter of time before the remaining circuits join in the debate. One district court in Arkansas has already followed the Third Circuit, perhaps positioning the Eighth Circuit to be the next to rule. *Rollins v. Farris*, 39 Fair Empl. Prac. Cas. 1102 (E.D. Ark 1985). At the administrative level, the EEOC will continue to seek confidential peer review information as it investi-

[5] The proliferation of law review commentary on the compelled disclosure of faculty peer review materials further underscores the unsettled state of the law. A selected listing of articles appears as Appendix B.

gates faculty members' complaints of employment discrimination. Between October 1, 1984 and September 30, 1985, EEOC received 1823 charges of discrimination against colleges and universities, some unspecified portion of which were filed by faculty members challenging decisions made by their peers.[6] EEOC Chairman Clarence Thomas announced in December 1985 that the Commission planned "more aggressive and more hard-nosed" enforcement for the coming year, particularly against employers who fail to comply with subpoenas issued during the course of an EEOC investigation.[7] One-fourth of the 400 cases filed by EEOC last year were subpoena enforcement actions, up from less than 10 percent of the cases filed in 1980.[8] These factors, coupled with the private civil rights litigation pursued by individual faculty members, strongly suggest that the issue will recur.

Because of the conflict in the circuits, the federal rights of professors now hinge on the vagaries of geography. Yet scholarship and academic interests are not circumscribed by state boundaries.[9] A faculty member may respond to an inquiry from a peer review committee at an institution anywhere in the country which is evaluating a fellow scholar. In the current circumstances, the degree of confidentiality accorded by federal

[6] In the first three months of the current fiscal year, from October 1 to December 31, 1985, the Commission received 466 charges against institutions of higher education. These figures were recently obtained from EEOC's office of Information Systems Services in Washington.

[7] "EEOC's Tough Stand to Continue in 1986, Warning Goes to Employers Who Refuse to Turn Over Documents," 120 LAB. REL. REP. 293-94 (BNA 12/9/85).

[8] *Id.*

[9] *See Burt v. Board of Regents of Univ. of Neb.*, 757 F.2d 242 (10th Cir. 1985), *vacated as moot sub nom. Connolly v. Burt*, 54 U.S.L.W. 3598 (S. Ct. 3/11/86) (whether *in personam* jurisdiction may be based on letter of reference mailed by faculty member to distant state).

law to such a reference depends on where the committee is located. National academic organizations such as AAUP also regularly confront the conflict in the circuits as they respond to requests for advice and assistance from faculty members and administrators about the legal standards governing the compelled disclosure of peer deliberations.

The question of the appropriate legal standard for disclosure of faculty peer review deliberations in connection with a civil rights claim has, as observed by both the majority and dissent in the Third Circuit, divided the courts of appeals. The issue, which will inevitably recur, has a broad impact on the academic community and merits resolution by this Court.

B. Flaws in the Third Circuit Decision. Even apart from the conflict in the circuits, the flaws inherent in the decision of the court below require review. We address the deficiencies of the rule devised by the Third Circuit when measured against sound academic practice. We then turn to the defects of the rule in light of First Amendment precedents of this Court, and conclude with some observations about the place of confidentiality in the peer review process, a consideration largely ignored by the court below.

In the wake of the imprisonment of Professor James Dinnan of the University of Georgia for his refusal to comply with a judicial order to divulge his vote on a tenure candidate, AAUP examined the competing considerations presented by the situation. The Association had earlier been contacted by Professor Maija Blaubergs, the unsuccessful tenure candidate whose allegations of discrimination later occasioned Dinnan's defiance. Committees within AAUP, not apprised of full details of the controversy, addressed the respective rights of tenure candidates and peer evaluators without passing judgment on the Georgia situation. The Association's

resulting policy position, *A Preliminary Statement on Judicially Compelled Disclosure in the Nonrenewal of Faculty Appointments*, was adopted unanimously by the AAUP's governing Council in 1980 as Association policy. 67 *Academe: Bull. of AAUP* 27 (Feb./Mar. 1981). While the *Preliminary Statement* was AAUP's immediate response to a new and difficult issue, we view the policy as having withstood the test of time. It appears as Appendix A.

The *Preliminary Statement* advocates a balancing approach, stating in essence that in order to defeat the qualified privilege protecting the peer review process, a disappointed candidate must raise a "sufficient inference that some impermissible consideration was likely to have played a role" in the adverse decision. Such a preliminary showing would prevail over the presumption of the integrity of the academic process. AAUP adopted the statement as the optimal accommodation of the interests of all parties, best serving the academic community as a whole. In developing its policy, the Association sought to balance the need for confidentiality in the peer review process against the need for disclosure to vindicate civil rights. The resulting standard does not permit a hollow allegation of discrimination to intrude into the sensitive deliberations of a peer review committee, but rather first requires a showing of possible merit to the individual's discrimination claim. AAUP submits that through this approach the competing values are appropriately reconciled.

The Second Circuit, expressly endorsed AAUP's position:

> We believe the position of the AAUP on the precise matter before us to be carefully designed to protect confidentiality and encourage a candid peer review process. It strikes an appropriate balance between academic freedom and educational excel-

> lence on the one hand and individual rights to fair consideration on the other. . . .

Gray v. Board of Higher Education, supra, 692 F.2d at 907. The Third Circuit's decision is plainly at odds with the balanced position adopted by AAUP on the basis of its experience in developing standards reflective of sound academic practice.

While the Third Circuit alluded to First Amendment interests present in this case, it proceeded to give virtually no attention to those interests in its construction of Title VII. In doing so the court ignored its obligation to interpret statutes so as to avoid constitutional questions and also disregarded the teachings of this Court on balancing governmental and academic interests.

Academic freedom is a "special concern of the First Amendment." *Keyishian v. Board of Regents,* 385 U.S. 589, 603 (1967); *Regents of the University of California v. Bakke,* 438 U.S. 265, 312 (1978) (Powell, J). At issue in this case is not the teaching or publication activity of an individual scholar, but rather the collective interests of the faculty and institution in effective faculty evaluations.[10] Justice Frankfurter listed first among the "four essential freedoms" of the university the freedom "to determine for itself on academic grounds who may teach." *Sweezy v. New Hampshire,* 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring). *Regents of the University of California v. Bakke,* 438 U.S. 265, 312 (1978) (Powell, J.). Interference with the university's autonomy in deciding who may serve on its faculty, even absent an impact on individual teaching or research, strongly implicates academic freedom. As explained in AAUP's *Preliminary Statement on Judicially Compelled Disclosure,*

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[10] *See* M. Finkin, "On Institutional Academic Freedom," 61 TEX. L. REV. 817, 843 (1983); W. Van Alstyne, "The Specific Theory of Academic Freedom and the General Issue of Civil Liberty," in THE CONCEPT OF ACADEMIC FREEDOM (E. Pincoffs ed. 1975).

> [I]ndividuals within the academy will not be free to exercise their academic freedom if the academy as a whole is not afforded the proper measure of self-governance.

Appendix A. This case thus raises significant constitutional issues regarding the degree to which the government may intrude into academic decisions that are central to the proper functioning of a college or university.

The Third Circuit expressly refused to balance these interests, deviating from precedents of this Court favoring such an analysis. When competing values have clashed with the legitimate needs of academic institutions, the Court has employed a balancing approach. In *Sweezy v. New Hampshire,* 354 U.S. 234 (1957), the Court reversed the criminal conviction of a professor who refused to answer to the state attorney general about his political beliefs and classroom lectures. Justice Frankfurter's pivotal concurring opinion recognized that government intrusion could be justified under "exigent and obviously compelling" circumstances. *Id.* at 262. In *Keyishian v. Board of Regents,* 385 U.S. 589 (1967), the Court used a balancing approach to invalidate New York's requirement of a loyalty oath for state university faculty members. In *Regents of the University of California v. Bakke,* 438 U.S. 265 (1978), the Court struck down a state medical school's special admissions program that created separate admissions criteria and set aside separate places for minority applicants. "Although a university must have wide discretion in making the sensitive judgments as to who should be admitted," the Court also emphasized that "constitutional limitations protecting individual rights may not be disregarded." *Id.* at 314. The fact that Title VII confers on the EEOC certain powers to obtain information does not mean that these powers may necessarily be invoked in the face of

competing constitutionally protected interests. *See Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982) (Ohio statute compelling disclosure of contributors to minor political party violated First Amendment).

Underlying the Court's resolution of this line of cases is the assessment of an appropriate degree of deference to the needs of academic institutions. Here those needs include candor and confidentiality in the peer review process. The Third Circuit's excessively broad standard will, we are convinced, weaken the soundness of the process.[11] Colleagues within the institution, no longer able to rely on appropriate confidentiality, will be increasingly reluctant to offer candid opinions, particularly negative ones. Experts from outside the institution, asked to provide evaluations, may decline to offer their judgments. The reluctance would be grounded not so much, as some have suggested, in a faint-heartedness, as in decency and professional concern for the public standing and reputation of the candidate. This Court has indicated in the context of the Freedom of Information Act, 5 U.S.C. § 552,

> Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . to the detriment of the decision-making process.

N.L.R.B. v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975). Unfettered disclosure of faculty evaluations will thus serve to reduce the reliability of the evaluations themselves, to the serious detriment of standards of excellence in higher education.

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[11] *See* W. Rehnquist, "Sunshine in the Third Branch," 16 WASHBURN L. J. 559 (1977) (examining hypothetically the adverse impact on the Court's decision-making process were its conferences not confidential).

CONCLUSION

To resolve the tensions created by the severe conflict among the circuits, and to fashion a solution that will avert a confrontation with First Amendment values, the Court should grant the petition for writ of certiorari in this case.

Respectfully submitted,

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APPENDICES

APPENDIX A

A Preliminary Statement on Judicially Compelled Disclosure in the Nonrenewal of Faculty Appointments

The following statement, approved by Committee A and adopted by the Council at their meetings in November, 1980, addresses the issues posed in seeking disclosure of faculty member's positions in a discrimination complaint. These issues have gained national attention in recent months as a result of the imprisonment of Professor James Dinnan of the University of Georgia after he refused to comply with a judicial order to divulge his vote on the tenure candidacy of Professor Maija Blaubergs.

A dramatic episode arising at the University of Georgia presents complex and difficult questions. What follows expresses no judgment about the facts or the merits of that case, as to which we believe the academic community to be insufficiently informed.

We believe that the harsh action of imprisonment, which we deplore, has overshadowed the underlying issues: first, the necessity of proper procedures for rectifying discrimination; second, the proper scope of judicial compulsion in such cases, to which this statement is principally addressed.

Faculty members have the right to decisions on the renewal of their appointments free of impermissible considerations, such as considerations violative of academic freedom or prejudice with respect to race, sex, religion, or national origin. This Association has buttressed this principle by concluding that, in the event of an adverse decision on renewal, the faculty member should be advised of the reasons which contributed to that decision, have an opportunity to request a reconsideration by the decision-making body, and have available a standing hearing committee to entertain any complaint that an

impermissible consideration played a role in the decision. Moreover, in the context of such proceedings the Association has recognized that in appropriate circumstances the participants in the decision-making process may permissibly be called upon to account for their actions.

At the same time, institutions ought to be free from impermissible external intrusions or constraints in making nonrenewal decisions. This freedom is claimed not only as a matter of prudence, resting upon the higher competence of those engaged in the enterprise to select their peers and the chilling effect upon that exercise of judgment engendered by external constraints, but as a matter of principle: individuals within the academy will not be free to exercise their academic freedom if the academy as a whole is not afforded the proper measure of self-governance. Therefore, when litigation involves judicially compelled disclosure of the actions and motivations of the faculty participants in the nonrenewal process, the courts should recognize the value of maintaining institutional integrity.

We believe it inappropriate for a court to compel disclosure of the actions and motivations of the individual participants in a nonrenewal decision without first weighing the facts and circumstances asserted by the complainant. A judgment must then follow that those facts and circumstances raise a sufficient inference that some impermissible consideration was likely to have played a role to overcome the presumption in favor of the integrity of the academic process. That is, the inference must be sufficiently strong to defeat the claim, albeit a qualified one, that faculty members may properly assert to a degree of privilege that shields their actions and thought processes from judicial inquiry. Among the factors that a court may properly weigh in making that determination are the adequacy of the procedures employed in the nonrenewal decision, the adequacy of the reasons offered in defense of the decision, the adequacy of the review

procedures internal to the institution, statistical evidence that might give rise to an inference of discrimination, factual assertions of statements or incidents that indicate personal bias or prejudices on the part of the participants, the availability of the information sought from other sources, and the importance of the information sought to the issues presented.

We reiterate, however, that this statement of general principle does not represent a judgment on whether or not a proper weighing of these factors occurred in the particular case that gave rise to our concern.

APPENDIX B

Citations to Law Review Commentary on the Disclosure of Faculty Peer Review Deliberations

Academic Freedom Privilege: An Excessive Solution to the Problem of Protecting Confidentiality, 51 U. Cin. L. Rev. 326 (1982)

Academic Freedom Privilege in the Peer Review Context: *In Re Dinnan* and *Gray v. Board of Higher Education*, 36 Rutgers L. Rev. 286 (1984)

Academic Freedom vs. Title VII: Will Equal Employment Opportunity Be Denied on Campus, 42 Ohio St. L. J. 989 (1981)

Balancing Academic Freedom and Civil Rights: Toward an Appropriate Privilege for the Votes of Academic Peer Review Committees, 68 Iowa L. Rev. 585 (1983)

Challenge to Antidiscrimination Enforcement on Campus: Consideration of an Academic Freedom Privilege, 57 St. John's L. Rev. 546 (1983)

Civil Rights—Academic Freedom, Secrecy and Subjectivity as Obstacles to Proving a Title VII Sex Discrimination Suit in Academia, 60 N. Car. L. Rev. 438 (1982)

Corngold, E., Title VII and Confidentiality in the University, 12 J. L. & Educ. 587 (1983)

Discovery of Tenure Proceedings: Through the Privilege Barrier, 20 Hous. L. Rev. 1447 (1983)

Due Process in Decisions Relating to Tenure in Higher Education, 39 Rec. A.B. City N.Y. 392 (1984) (authored by the Special Committee on Education and the Law of the Association of the Bar of the City of New York), reprinted in 11 J. Coll. & Univ. L. 323 (1984)

Evidence—A Privilege Based on Academic Freedom Does Not Insulate a University from Disclosing Confidential Employment Information, 52 Miss. L. J. 493 (1982)

Gregory, J., Secrecy in University and College Tenure Deliberations: Placing Appropriate Limits on Academic Freedom, 16 U. Cal. Davis L. Rev. 1023 (1983)

Hill, J., Hill, E., Employment Discrimination: A Rollback of Confidentiality in University Tenure Procedures?, 22 Am. Bus. L. J. 209 (1984)

Kaplan, D., Cogan, B., Case Against Recognition of a General Academic Privilege, 60 U. Det. J. Urb. L. 205 (1983)

Lee, B., Balancing Confidentiality and Disclosure in Faculty Peer Review: Impact of Title VII Litigation, 9 J. Coll. & Univ. L. 279 (1983)

Liethen, M., Academic Freedom and Civil Discovery, 10 J. Coll. & Univ. L. 113 (1984)

Mobilia, M., The Academic Freedom Privilege: A Sword or a Shield?, 9 Vt. L. Rev. 43 (1984)

Preventing Unnecessary Intrusions on University Autonomy: A Proposed Academic Freedom Privilege, 69 Calif. L. Rev. 1538 (1981)

Tepker, H., Jr., Title VII, Equal Employment Opportunity, and Academic Autonomy: Toward a Principled Deference, 16 U. Cal. Davis L. Rev. 1047 (1983)

The importance of the issue before the Court in this case is reflected by the fact that the amici curiae include not only state institutions but also private institutions, including secular institutions like Carnegie-Mellon University, Point Park College, the Medical College of Pennsylvania and the University of Medicine and Dentistry of New Jersey, as well as religiously-affiliated institutions.

The amici here represented reflect a wide variety of religious concerns. A number of those not already mentioned are Roman Catholic: Duquesne University of the Holy Ghost, Saint Vincent's College, Carlow College, the University of Scranton, Seton Hill College, Seton Hall University, and the Allentown College of St. Francis de Sales.

Others reflect Protestant denominations: Texas Christian University (Disciples of Christ); Thiel College and Susquehanna University (Lutheran); and the Pittsburgh Theological Seminary of the Presbyterian Church (USA) (Presbyterian). These institutions, down to the smallest amici, Lancaster Bible College with only 350 students, ordinarily have a special concern for the First Amendment because they are religiously affiliated. Their participation reflects a heightened concern that the Third Circuit's decision, which fails to give weight to one type of First Amendment freedom, also suggests that a balancing test will not be followed where other First Amendment freedoms are involved in EEOC investigations.

The concern of these amici is a very realistic and immediate one. One amicus, Saint Francis College, already has had the Third Circuit's ruling applied to it. *Allan v. St. Francis College,* F.2d (3d Cir. Docket No. 85-3205; March 3, 1986) (Slip Op. at 26 n.16).[2]

A complete listing of the institutions participating as amici curiae is set forth at the end of this brief.

REASONS FOR GRANTING THE PETITION

The 66 amici curiae appearing by this brief join with petitioner in urging this Court to review the Third Circuit's decision because it is in direct conflict with decisions from this Court and two other courts of appeals, because the Third Circuit's loose relevance standard fails to give proper consideration to the First Amendment concerns present here and to the tenure review process in particular, and because the decision represents a major departure from related precedent in the Fourth, Fifth, and Ninth Circuits.

This is a very important issue. The guarantee that evaluations and comments received about a faculty member will remain confidential is an essential element of the tenure review process. Moreover, preserving that confidentiality has been a right and responsibility of institutions of higher education since the rise of the university in medieval times.

In the year 1231, Pope Gregory IX issued a Papal Bull to the Masters at the University of Paris that acknowledged and protected a number of rights, in order to resolve a cessation of teaching at the University of Paris which had gone on for several years. Among the rights protected was

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[2]The decision also has been applied outside of the Third Circuit. *Paul v. Stanford University,* F.Supp. , 39 CCH EPD ¶35,918 at 41,370 (N.D. Cal. 1986); *Rollins v. Ferris,* F.Supp. , 39 BNA FEP Cases 1102, 1104-05 (E.D. Ark. 1985) (applying decision at the University of Central Arkansas).

the confidentiality of the advice of those Masters as to the candidacy of others to become professors.

> Therefore, concerning the condition of the students and schools, we have decided that the following should be observed: each chancellor, appointed hereafter at Paris, at the time of his installation . . . shall swear that, in good faith, according to his conscience, he will not receive as professors of theology and canon law any but suitable men, at a suitable place and time, according to the condition of the city and the honor and glory of those branches of learning; and he will reject all who are unworthy without respect to persons or nations. Before licensing any one, during three months, dating from the time when the license is required, the chancellor shall make diligent inquiries of all the masters of theology present in the city, and of all other honest and learned men through whom the truth can be ascertained, concerning the life knowledge, capacity, purpose and other qualities needful in such persons; and after the inquiries, in good faith and according to his conscience, as shall seem fitting and expedient. The masters of theology and canon law, when they begin to lecture, shall take a public oath that they will give true testimony on the above points. *The chancellor shall also swear, that he will in no way reveal the advice of the masters, to their injury; the liberty and privileges being maintained in their full vigor for the canons at Paris, as they were in the beginning.* Moreover, the chancellor shall promise to examine in good faith the masters in medicine and arts and in the other branches, to admit only the worthy and to reject the unworthy.[3]

[3]*Translations & Reprints from the Original Sources of European History*, No. 3 at 8 (D. Munro, ed., University of Pennsylvania Dept. of History) (P. S. King & Son, publ.) (London 1897). (Emphasis added.)

(Continued on next page)

The Third Circuit acknowledged that, today, such confidentiality plays an "important role" in the peer group review process which is "central" to the determination of "who may teach"—one of the essential academic freedoms protected by the First Amendment. (Petition at 8a.) Nevertheless, the Third Cirucit refused to follow a balancing of interests approach which would evaluate the potential infringement of First Amendment freedoms on a case by case basis. (Petition at 8a.) Thus, the Third Circuit decision not only fails to respect this historic and essential freedom but it also placed that circuit in direct conflict with decisions of this Court and other courts of appeals.

The Third Circuit also erred by failing to recognize the significance of the fact that this was an *individual* Title VII charge—not a charge that there has been a "pattern and practice" of discrimination throughout the institution. This error led the Third Circuit to require institution-wide disclosure of peer review tenure materials in a case involving only one instructor. This is a marked departure from prior precedent. This error also led the Third Circuit to fail to consider that Title VII's relevance standard properly is more narrow in an individual case than in an institution-wide or "pattern or practice" case.

Thus, although even the Third Circuit recognized that its decision created a conflict with two other courts of appeals on at least the First Amendment issue, the practical impact of the decision—when its "relevance" aspects also are considered—creates a conflict which is even broader and more dramatic.

(Continued)

The University of Paris was the great model for other French, English, German, Spanish, and Portugese universities. *Id.* at 1.

These errors led to a decision which is of critical importance to our nation's colleges and universities because it will drastically deter the candid commentary from participants which is essential to peer-group faculty reviews. The Third Circuit's decision, if not reviewed by this Court, will have a highly detrimental impact upon the ability of academic institutions to obtain the information and analysis essential to the faculty promotion and tenure decision-making process. Indeed, even the Third Circuit panel majority recognized that its decision will be the "demise" of the confidentiality in the peer-group review process which has been revered since at least medieval times. (Petition at 10a).

I. The Third Circuit Decided An Important First Amendment Issue In A Manner That Was Not Correct And Which Conflicts With Decisions Of This Court And Other Courts Of Appeal.

The Third Circuit acknowledges that First Amendment freedoms were infringed upon by its decision. (Petition at 8a.) The Third Circuit also acknowledged that confidentiality in the peer review system played an "important role" in the exercise of that academic freedom. (Petition at 8a.)

Nevertheless, the Third Circuit ignored the clear precedent of Constitutional decisions of this Court that require both a balancing of the interests involved on a case by case basis and a narrow tailoring of the scope of any intrusion permitted upon the First Amendment freedom at issue.

This Court has held that academic freedom, like political expression, is an area in which the government "should be *extremely reticent* to tread." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). Where a governmental intrusion into protected First Amendment values may occur, this Court has required that the means pursued be narrowly drawn so not as to "stifle fundamental personal liberties." *Keyishian v. Board of Regents*, 385 U.S. 589, 602 (1967); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). In situations such as this, the danger of a "chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools . . . " *Keyishian, supra*, 385 U.S. at 604.

At a minimum, a "balancing of interests" on a case-by-case basis is required. *See, e.g., Sweezy, supra*, 354 U.S. at 250-55; 354 U.S. at 265-67 (Frankfurter, J., concurring); *Konigsberg v. State Bar*, 366 U.S. 36, 51 (1961); *Branzburg v. Hayes*, 408 U.S. 665, 710 (1972) (Powell, J., concurring).

Directly contrary to the approaches of the Seventh Circuit[4] and the Second Circuit,[5] both of which recognized an invasion by the government into a First Amendment value and designed safeguards to protect that value, the Third Circuit refused to engage in a balancing of interests test even though it acknowledged that First Amendment freedoms were involved. The Third Circuit declined to follow either the *Notre Dame* or *Gray* decisions. Indeed, the Third Circuit in this case did not engage in any constitutional analysis. This disregard of academic freedom and the confidentiality of the peer review process should not and cannot be permitted. A traditional freedom, essential to colleges and universities throughout this nation, is at stake.

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[4] *EEOC v. University of Notre Dame du Lac*, 715 F.2d 331 (7th Cir. 1983).

[5] *Gray v. Board of Higher Education*, 692 F.2d 901 (2d Cir. 1982).

The Third Circuit cited the legislative history of Title VII as the basis for its determination that it would not follow a balancing approach or adopt a qualified privilege concerning peer group evaluations, as the Second and Seventh Circuits did, respectively.

This also reflects several fundamental errors of Constitutional interpretation.

First, in a situation in which First Amendment freedoms are involved, Congressional views evidenced in legislative history or even in statutory language cannot remove the Constitutional protections afforded those freedoms, including the requirement of performing a balancing test. *Cf. Almeida-Sanchez v. United States,* 413 U.S. 266, 272 (1973) ("[N]o Act of Congress can authorize a violation of the Constitution.").

Of course, the legislative history of Title VII might be relevant to the interpretation of the interests and concerns reflected in *that statute*—but not to determining the scope of a Constitutional protection—here, the First Amendment.

Even if the standards for interpretation of a statute were applicable, however, the Third Circuit applied the wrong test. The Third Circuit incorrectly examined Title VII for evidence that Congress *did not* intend to permit the EEOC to intrude into this area of First Amendment protection. (Petition at 10a.) Because intrusion upon a Constitutional freedom was involved, any examination of the legislative history of Title VII—assuming *arguendo* that such an examination were relevant—would have to look for indications that Congress expressly *did* intend to invest the EEOC with the unbridled discretion to ignore academic freedom and to violate the confidentiality of the

peer review process. *NLRB v. Catholic Bishop of Chicago,* 440 U.S. 490, 507 (1979).

> It is always appropriate to assume that our elected representatives, like other citizens, know the law . . . . Moreover, "In areas where legislation might intrude on constitutional guarantees, we believe that Congress, which has always sworn to protect the Constitution, would err on the side of fundamental constitutional liberties when its legislation implicates those liberties."[6]

For all of these reasons, the amici urge this Court to review the Third Circuit's decision in the instant case. A fundamental part of the collegial system is at stake. The importance of this issue to the amici and other educational institutions cannot be overemphasized.

As Richard Hofstadter and Walter Metzer wrote in *The Development of Academic Freedom In The United States* (Col. Univ. Press, 1955) at 506:

> "No one can follow the history of academic freedom in this country without wondering at the fact that any society, interested in the immediate goals of solidarity and self-preservation, should possess the vision to subsidize free criticism and inquiry, and without feeling that the academic freedom we still possess is one of the remarkable achievements of man. At the same time, one cannot but be appalled at the slender thread by which it hangs . . . ."

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[6] *Lowe v. Securities & Exchange Comm'n,* U.S. , 105 n. 50, 105 S.Ct. 2557, n. 50, 86 L.Ed.2d 130, 148 n. 50 (1985), *quoting, Time, Inc. v. Regan,* 468 U.S. , 82 L.Ed.2d 487, 104 S.Ct. 3262 (1984) (Stevens, J., concurring in part and dissenting in part) (citations omitted).

II. The Third Circuit's Holding That Tenure Materials From Throughout The Institution Must Be Produced In An Individual Case Is A Marked Departure From Prior Precedent Nationwide.

The Third Circuit made a major error in legal analysis by failing to focus upon the fact that the charge before the EEOC was that there had been discrimination against a single individual, not that there had been institution-wide or "pattern or practice" discrimination.

This error led the Third Circuit to order the college to disclose confidential peer review tenure materials from the files of every faculty member who had been considered for tenure over a four year period throughout the institution, even though the only matter before the EEOC investigator was the claim of a single disgruntled instructor that he, and he alone, had been discriminated against. This result put the Third Circuit into a conflict with prior decisions on the disclosure of confidential tenure-related materials which is far broader than the conflict the Third Circuit admitted it created with prior decisions by the Second and Seventh Circuit Courts of Appeals. The result is an undesirable and unnecessary departure from related precedent from the Fourth, Fifth, and Ninth Circuits, as well. Moreover, this same error led it to apply Title VII relevance standards from a pattern and practice case to an individual case. That approach would not have been correct under Title VII—even if no First Amendment freedom were involved.

Prior to the Third Circuit's decision in this case, we are aware of no court that had ordered an American college or university to disclose all of its confidential tenure materials *institution-wide* in connection with an *individual* claim of discrimination. Moreover, even in those situations in which other courts have allowed an individual to have

access to his *own* confidential materials, it has only been after a special showing of need and relevance to balance against the privilege of confidentiality—at least until this case.

This issue first arose in the Ninth Circuit. In *McKillop v. University of California,* 386 F.Supp. 1270 (N.D. Cal. 1975), a case relied upon by a number of courts which addressed the issue subsequently,[7] the plaintiff alleged that she had been denied tenure in violation of Title VII. She sought to compel disclosure of confidential tenure materials relating both to her and to other persons in her department. The court held that, applying either federal[8] or state law, the confidential tenure materials were privileged and, therefore, protected from disclosure. The court emphasized a crucial fact which the Third Circuit overlooked—that the plaintiff's case was one in which she claimed that she had been discriminated against as an individual, so that "the focus of her case must be the actions and state of

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[7] *EEOC v. University of Notre Dame du Lac,* 715 F.2d 331, 337 (7th Cir. 1983); *Gray v. Board of Education,* 692 F.2d 901 (2d Cir. 1982); *Zaustinsky v. University of California,* 96 F.R.D. 622 (N.D. Cal. 1983) (Vacating order requiring disclosure of confidential tenure documents of plaintiff and seven other persons in an individual tenure denial case); *Laborde v. University of California,* 686 F.2d 715, 719 (9th Cir. 1982) Affirming denial of untimely motion to disclose plaintiff's own peer review files); *Lynn v. University of California,* 656 F.2d 1337 (9th Cir. 1981) (Specifically not deciding the privilege or First Amendment issues but allowing disclosure of plaintiff's own complete file only because part of her file materials had been offered into evidence by the University); *Hafermehl v. University of Washington,* 29 Wash.App. 366, 628 P.2d 846 (Ct. App. 1981) (Disclosure of faculty member's tenure materials denied); *King v. University of California,* 138 Cal. App.3d 812, 818-19, 189 Cal. Rptr. 189 (1982) (Disclosure of faculty member's peer review materials denied in defamation action); *Stanford University v. Superior Court,* 119 Cal. App.3d 516, 174 Cal.Rptr. 160 (1981) (Reversing order compelling disclosure of faculty member's peer review materials).

[8] 386 F.Supp. at 1278-79 n.15.

mind of the individuals responsible for that decision." *Id.* at 1277.

The Third Circuit's decision also is a distinct departure from two court of appeals decisions[9] which did allow an individual professor to have disclosed to him confidential tenure information relating to himself in an individual case. Each of those other courts of appeals made it clear that disclosure was required because the information related to the individual whose tenure was denied and because the university had relied on those evaluations in explaining why tenure was denied. The Third Circuit's rule—requiring the disclosure of confidential tenure review materials institution-wide in an individual case—is in distinct conflict with the rationales of both the Second and Fifth Circuits.

The Third Circuit's decision is also in stark conflict with the Fourth Circuit's decision in *Keyes v. Lenoir Rhyne College*, 552 F.2d 579 (4th Cir.), *cert. denied*, 434 U.S. 904 (1977). The Fourth Circuit held that a Title VII plaintiff was not entitled to disclosure of the confidential evaluation materials from across the institution even though the plaintiff had alleged institution-wide discrimination.

The Third Circuit's ruling that confidential tenure materials must be disclosed institution-wide without any special showing that they are related to an individual tenure denial dispute also conflicts with the Seventh Circuit's approach, as the Third Circuit recognized. By contrast, the Seventh Circuit requires careful consideration of "factors

[9] *Gray v. Board of Education*, 692 F.2d 901 (2d Cir. 1982); *Jepsen v. Florida Board of Regents*, 610 F.2d 1379, 1384 (5th Cir. 1980).

unique to the context of faculty tenure denial" and a showing by the EEOC of a "particularized need" before such confidential materials must be disclosed.[10]

These four court of appeals decisions highlight the conflict created by the Third Circuit's decision. Had the *Franklin & Marshall* case arisen in the Second, Fourth, Fifth or Seventh Circuit, the confidentiality of peer review material would have been respected because Franklin & Marshall did not contend that the individual instructor's denial of tenure should be justified on the basis of the confidential tenure evaluation materials of all other professors throughout the college for a four-year period.[11]

This same error by the Third Circuit—failing to recognize the significance of the fact that the instructor was alleging only that he personally had been discriminated against, not that there were college-wide illegal practices—led it to read the relevance standard out of Title VII.

It did so by applying this Court's decision in *EEOC v. Shell Oil Co.*, 466 U.S. 54 (1984), as if it had established that broad institution-wide discovery is appropriate in every Title VII case. The Third Circuit's reliance upon *Shell Oil* was misplaced, for three reasons.

First, the scope of what evidence might be relevant was not at issue in the *Shell Oil* case. The issue was, instead, whether Shell was relieved of the obligation to

[10] *EEOC v. University of Notre Dame du Lac*, 715 F.2d 331, 338-39 (7th Cir. 1983).

[11] Although the *Franklin & Marshall* reasoning is consistent to some extent with that used by the Eleventh Circuit in *In Re Dinnan*, 661 F.2d 426 (11th Cir. 1981), *cert. denied*, 457 U.S. 1106 (1982), the Third Circuit's approach represents a departure from even that decision, which required disclosure of confidential data only as to the individual tenure decision at issue in that case.

furnish any data at all because the EEOC allegedly had not followed Title VII's notice procedures. Moreover, this Court made it clear—not only that no definition of "relevance" issue was before it—but also that the relevance standard should not be read out of the statute.[12]

Second, *Shell Oil* was a case in which a "pattern or practice" of discrimination was alleged to have occurred not as to one person, as in the *Franklin & Marshall* case, but as to all employment practices throughout the facility. The Third Circuit made a clear error in assuming that the same broad relevance standard which might be appropriate in a facility-wide pattern or practice case would apply to an individual's claim that he, and he alone, suffered discrimination in one discrete way, denial of tenure. Moreover, the general remarks by this Court about relevance in the *Shell Oil* facility-wide pattern or practice context must be considered in light of the fact that, unlike this case, no First Amendment freedom was implicated or considered by this Court in *Shell Oil.*

Third, the Third Circuit failed to focus on the unique nature of tenure decisions. Had it done so, it would have recognized that each tenure decision is unique. There is no basis whatever for its conclusion that disclosing confidential peer review evaluations used in the tenure process in the math or political science departments might shed any

[12]"Congress did not eliminate the relevance requirement, and we must be careful not to construe the regulation adopted by the EEOC governing what goes into a charge in a fashion that renders that requirement a nullity."

466 U.S. at 69.

light on an unrelated tenure decision in the french department four years later.[13]

In short, by failing to recognize the significance of the fact that the *Franklin & Marshall* case was one individual instructor's claim that he, and he alone, was discriminated against, the Third Circuit's decision not only misapplies this Court's holding in *Shell Oil* and conflicts with decisions from the Second and Seventh Circuits on the First Amendment/privilege issue but also it represents a major departure from Title VII precedent regarding the scope of disclosure as previously applied in college and university cases in the Fourth, Fifth, and Ninth Circuits.

[13]Not only are tenure decision unrelated to each other but tenure committee members may, quite properly, find the same candidate unworthy of an award of tenure for different reasons. *Banerje v. Board of Trustees, Smith College,* 648 F.2d 61, 64 (1st Cir. 1981).

CONCLUSION

For all of the foregoing reasons and for the additional reasons advanced in the petition, the writ of certiorari should be granted.

Respectfully submitted,

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April 30, 1986

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SUPREME COURT OF THE UNITED STATES

FRANKLIN AND MARSHALL COLLEGE *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 85–1439. Decided June 2, 1986

The petition for a writ of certiorari is denied.

JUSTICE WHITE, with whom JUSTICE BLACKMUN joins, dissenting.

The Equal Employment Opportunity Commission is investigating petitioner on a charge of discriminating on the basis of national origin in denying tenure to a former assistant professor. In the course of its investigation, the EEOC issued a subpoena *duces tecum* for evaluations submitted by petitioner's faculty in all cases in which tenure was granted or denied from 1977 to the present. The EEOC offered to accept t e subpoenaed materials with names and identifying charact ristics deleted. Petitioner resisted the subpoena, asserting a privilege against the compelled production of confidential peer review materials absent a showing of facts supporting an inference of discrimination. The United States Court of Appeals for the Third Circuit rejected the asserted privilege, 775 F. 2d 110 (1985), which has been accepted by another Court of Appeals, see *EEOC* v. *University of Notre Dame du Lac*, 715 F. 2d 331, 337, n. 4 (CA7 1983). I would grant certiorari to resolve this conflict.